No. 385

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SHIP "JOSEPH B. THOMAS," SAMUEL WATTS, ET AL., CLAIMANTS,
Appellants,

vs.

JENS P. JENSEN,
Appellee.

BRIEF FOR APPELLANTS.

ANDROS & FRANK,
Advocates for Appellants.

United States Circuit Court of Appeals in and for the Ninth Circuit.

IN ADMIRALTY.

SHIP "JOSEPH B. THOMAS,"
SAMUEL WATTS et al.,
Claimants and Appellants,
vs.
JENS P. JENSEN,
Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

In this action the libelant seeks to recover damages for personal injuries sustained by him on the ship "Joseph B. Thomas," while he was engaged as a laborer in the service of a stevedore, who had been employed by the claimants to receive and stow the cargo of that vessel at the port of Philadelphia.

The cause was heard in the United States District Court for the Northern District of California, on proofs all taken before commissioners, and that Court entered,

in favor of the libelant, a final decree in the gross sum of $6,000. From this decree the claimants have appealed to this Court.

The libelant alleges that on the 11th day of April, 1892, the ship "Joseph B. Thomas" was being loaded at the port of Philadelphia by a stevedore who had, under a contract, undertaken to load her cargo. That the libelant was a laborer in the employ of said stevedore, and, on the day above mentioned, was in the hold of the ship, engaged as one of the employees of said stevedore, in the work of loading the cargo of said ship;

That between three and four o'clock in the afternoon of said day, while the libelant was lawfully at work in the hold of said vessel, a barrel fell through the hatchway of the vessel down into the hold where the libelant was working, striking him on the head;

That said barrel fell down said hatchway and upon the libelant in consequence of the negligence of the master and of those intrusted by the owners of said vessel with the care and management of the same;

That by reason of the fall of said barrel upon the libelant, he sustained permanent injuries to his health and body of a most serious character, and alleges damages in the sum of ten thousand dollars. (Libel, Art. 1, 2, 3, 4. Record, pp. 6-7.)

The claimants deny that any barrel fell through the hatch; aver that while the libelant, one of several laborers employed by the stevedore to stow the cargo of the

ship was engaged in that occupation in the hold of the vessel, a small keg which some one had placed upon the hatch covers, which were lying on the deck of the ship, fell therefrom through the hatchway into the hold, striking the libelant on the head and seriously injuring him.

That it was usual and customary for laborers employed by stevedores to load and unload vessels at the port of Philadelphia, to take off and put on, as occasion might require, the hatch covers of such vessels while being loaded.

That the laborers, among whom was the libelant, on the morning of the day on which the accident to the libelant occurred, took off the hatch covers of the fore hatch, and negligently and carelessly piled them up forward of the head ledge or forward coaming of the hatch, and that one of the laborers, a coservant of the libelant, trod upon or otherwise negligently interfered with said hatch covers, by reason of which, and also in consequence of the improper and negligent manner in which said hatch covers had been placed in position by some of the laborers, coservants of the libelant, they tipped and precipitated the keg into the hold of the vessel.

That the accident and injury to the libelant was occasioned and brought about solely in consequence and by reason of the negligence of the coservants of the libelant, or some of them, and not by reason of any supposed negligence of the claimants, or of any of them, or that of their servants, or of any of them. (Answer, art. 5; Record, p. 19.)

On the 11th day of April, 1892, the ship "Joseph B. Thomas," bound on a voyage from the port of Philadelphia to the port of San Francisco, was lying alongside of a wharf in the former port, and was taking in cargo for the port last named, which was being laden on board and stowed by a stevedore under a contract with the owners of the ship, and who, for this purpose, employed a gang of laborers, of which the libelant was one, working under the immediate supervision of a foreman. It was the business of these laborers when they stopped work for the day to put on the covers of the hatches in the main deck of the ship, through which the cargo was being lowered into the hold and into the between decks, and to take them off when they resumed work the next morning. There were three of these covers on the fore hatch, through which, at the time of the accident to the libelant, cargo was being taken and stowed below. This hatch was from six to eight feet square, and was situated under the topgallant forecastle, and directly under the hatch in the deck of this forecastle. These hatch covers were a little crowning or curved, and when taken off by the stevedore's laborers were piled one on another near the head hedge or forward coaming of the hatch, which was about twelve inches high. Unless these covers were properly piled, they were, if sufficiently disturbed, liable to tip or otherwise become displaced.

On the morning of the day on which the libelant was injured, some person placed a small empty keg on these hatch covers, where it remained until some time in the af-

ternoon, when some one—the claimants contend that it was one of the stevedore's men, and the libelant that it was one of the ship's company—trod or jumped on these covers, which so disturbed their position that this keg was thrown from them, and fell through the hatch into the hold where the libelant was at work, striking him on his head and seriously injuring him—which is the injury for which, in this action, he seeks to recover damages against the ship.

At the time of the accident to the libelant the ship had no crew. The captain and first officer were absent at their homes in the State of Maine. The only persons connected with the ship and then present were the second and third officers, the carpenter, steward, and two ship's "boys." None of these persons had anything to do with the reception or stowing of the cargo, or in performing any act connected with the same. This was the sole business of the stevedore and that of his servants, of whom the libelant was one.

The Court below found that the libelant was entitled to recover against the claimants, and entered a decree in the sum of six thousand dollars. From this decree the claimants have appealed to this Court.

POINTS AND AUTHORITIES.

Under this statement of the case, the questions to be considered are, therefore:

1. Was the accident to the libelant the result of negligence on the part of the coservants of the libelant, or of some of them?

2. Was it the result of the negligence of the servants of the claimants?

The position of the claimants is that the injury occurred from the immediate act:

1. Of a fellow-servant, one of the employees of the stevedore who was loading the vessel under a contract with the owners thereof, and over whom the claimants had no control; and

2. The proximate cause of the injury to the libelant was the fact that the hatch covers were piled one upon another, in such a manner that when this employee ran trod or jumped upon it, the cover tilted, overturned the keg, and it fell throught the hatchway into the hold.

The testimony of all the witnesses was taken by deposition, and was so offered in the District Court. Therefore, the case comes before this Court without such presumptions in favor of or against the weight of the testimony of any witness by reason of the opportunity given the Court below to observe him and to judge of his veracity or mendacity, his intelligence or his dullness.

See The Glendale, 81 Fed. Rep. 633.

The opinion of the Court below sets out a brief statement of the facts. After stating the contention of the parties, he concludes (p. 153): "The testimony is irreconcilably conflicting." He then proceeds thus:

"In this connection, the evidence of two witnesses not connected with the ship nor with the stevedore's gang, who happened to be on board the vessel at the time that the libelant was injured, is of great importance in en-

abling the Court to arrive, substantially, at the real state of facts. These two witnesses, as far as the evidence discloses, appear to be disinterested."

We shall set forth, more fully than is done in the opinion, the testimony of these two witnesses introduced on behalf of the libelant, and endeavor in each case to estimate its value, to indicate its weakness, and to endeavor to show that its importance has been overestimated by the Court below.

It will not be amiss to remind this Court of a preliminary principle to which the libelant is subject.

"The burden of proof, in an action upon negligence, always rests upon the party charging it. . . . . It is not enough for him to prove that he has suffered loss by some event which happened upon the defendant's premises, or even by the act or omission of the defendant. He must also prove that the defendant, in such act or omission, violated a duty resting upon him."

Shearman & Redfield on Negligence, 12.

It was then the duty of libelant to prove beyond uncertainty, that the immediate or proximate cause of the injury was the act of the claimants, or that of some person or persons for whose acts the claimants were responsible. We claim that the libelant has completely failed to make such proof. Our position we believe unanswerable, if it were based exclusively upon the testimony of the witnesses for libelant. We claim that he is held by the facts as testified to by them, and that he cannot claim any exemption from the effect of their testimony.

Another principle, for the application of which to the facts of this case we shall appeal, is, that claimants cannot be held for any injury which was not a result naturally and reasonably to be expected from the act of their employee, and could not have been foreseen.

Schaffer v. Railroad Co., 105 U. S. 249.

McClary v. Railroad Co., 3 Nebraska, 53.

We also believe that the rule laid down by Field, J., in the Nitro-glycerine cases, 15 Wall. 524, is applicable here. "The rule deducible from them [cases cited] is that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own."

Would the claimants have any cause of anxiety—would they be imprudent or incautious—if, while stevedores were employed in the hold of the vessel under the hatch, they should leave a single-headed, empty, four gallon keg sitting on the further end of a hatch cover, several feet distant from the hatch, and three or four inches below the level of the hatch coaming?

The two things to be first determined in this investigation are (1) the position of the keg which was thrown down the hold; (2) the person who caused the keg to be thrown down the hold.

In determining the first is involved the question as to how were piled the covers, on which the keg rested. These facts are undisputed by claimants. The libelant was one of a gang of stevedores engaged in loading the ship "Jo-

seph B. Thomas," at the port of Philadelphia, and was injured on the afternoon of April 11th, 1892, while at work in the lower hold of the vessel under the forward hatch. There was a gang of stevedores engaged in loading case oil. At the time of the accident, several of them, including the libelant, were at work in the lower hold under or near the forward hatch, engaged, for the most part, in tearing up a stage which had been put in the hold,in order to render the work of loading more easy; the foreman and two or three other men were in the between decks at the forward hatch; the burton-tender was on the main deck, and the engineer was on the wharf. The hatch covers, consisting of three pieces, had been taken off that morning by the stevedore gang, although it does not appear which of the men performed that service.

There were only six of the ship's company on board—the second and third mates, the steward, the carpenter, and two boys. According to the testimony of libelant's witnesses, the second officer was between decks, attempting to climb up the stanchion to the main deck, and called out for some one to help him over the hatch combing. At the main hatch, fifty feet distant, was a ladder, which was the usual mode of descent and ascent. (Testimony of Hannum, Transcript, pp. 138 and 147.) There appeared no reason why he should attempt to climb a slippery stanchion nine feet high, and thence over the hatch coaming, depending upon finding some one on the main deck to help him out, with a liability of falling twenty-five feet

(p. 50) into the hold if he failed, instead of taking the easy and usual way of the ladder.

We maintain that upon the testimony of libelant's witnesses alone, he was not entitled to a decree, and to the examination of their testimony we first ask the attention of the Court.

They do not, it may be noted, attempt to locate the third officer or either of the boys, the steward, or the carpenter.

In addition to these, it is claimed on behalf of the libelant, that there were on board two persons, entire strangers to the company—John F. Fitzgerald and William B. Gray—who came aboard to get a piece of rope.

It may be noted here, that it is very singular that not one of the other libelant's witnesses, the stevedores, testify to having seen either of these two men, nor is any stevedore asked concerning them. On the other hand, Hannum, the third mate, who was under the forecastle on the main deck at the time of the accident (p. 126), swears (p. 137) that there was no such person there, and that if any stranger from the shore had come on the main deck under the topgallant forecastle—for that is where the second and third mates were—and had asked the second mate to give him a piece of rope, he would, in his opinion, have seen and heard him.

Inasmuch as this is an appeal from the decree of the District Court, and the opinion of that Court, the basis of the decree, is made a part of the transcript of the record, and will certainly claim the careful attention and consid-

eration of this Court, it will be necessary for the appellants to respectfully point out what they conceive to be errors of that Court, as indicated in its opinion, when considering and weighing the testimony, we shall, in considering the various questions that arise out of the facts of the case, be guided, as nearly as may be, by the order pursued in the opinion of the Court.

I.

HOW THE COVERS WERE LAID.

On page 152, line 16, of the Transcript, the opinion says concerning them:

"They were piled one on top of the other forward of the forward hatch on the main deck, and, so far as the evidence discloses, were piled in the usual and proper manner. It is true that the second mate who testified on behalf of the claimants stated, that he noticed that day that the hatch covers were improperly piled up, but I am unable to accept this testimony uncorroborated by any other witness, as I seriously doubt the credibility of the testimony of the second mate in other material respects." We find corroboration of his testimony in the failure of every witness of libelant to deny its truth.

This Court will bear in mind that the vessel was practically abandoned to the stevedores, of whom Patrick O'Donnell was the foreman. No business whatever was being carried on in the vessel at that time, except stowing

the cargo. The stevedores took possession of the part of the vessel where they were engaged; they took off the hatch covers as part of their work, and laid them as they chose, undirected by any one connected with the ship. They, and not the persons connected with the vessel, determined the position the hatch covers should occupy, and in their hands so far was the complete management. They took off the covers and laid them near the hatchway, in what direction they chose, piled them evenly or unevenly, loosely or firmly, negligently or carefully, as they willed. They were the only laborers in the hatch beneath, and in themselves lay the responsibility of leaving the covers and maintaining them, in such a condition, that peril did or did not impend over them. Several of them testified as to how the covers were laid by them, but not one of them said that they were properly laid. Even the most important of them, Patrick O'Donnell, their foreman, confessed his ignorance as to how they were then, or were usually laid. He said (p. 54) that the covers were in two pieces, and when asked to tell the proper way of piling them, answered with simpleness (p. 55): "I suppose one on top of the other."

This Court can be properly informed of what the witnesses of libelant testified concerning the covers, their measurements and location, only by a full quotation of their testimony.

P. O'Donnell, the foreman of the stevedores, testified (p. 53), on cross-examination:

"Q. It was usual for your men to take the hatch coverings off, wasn't it? A. Yes, sir.

Q. You have no recollection how they were piled, except that they were forward of the fore hatch; that is all you know, is it not?

A. One on the top of the other; yes, sir.

Q. They would come up to about the level of the hatch coamings, I suppose?

A. Well, I don't think they would within about three or four inches."

Also, on cross-examination (pp. 53, 54):

"Q. Where were the hatch coverings?

A. Forward of the fore hatch on the main deck.

. . . . . .

Q. You have no recollection how they were piled except that they were forward of the fore hatch; that is all you know, is it not?

A. One on top of the other; yes, sir.

Q. They would come up to about level with the hatch coamings, I suppose?

A. Well, I don't think they would within about three or four inches.

Q. How high were the hatch coamings? A. I should judge about nine to ten inches.

Q. I mean the forward hatch coamings. A. Yes, sir.

Q. Was the hatch covering in two or three pieces? A. I think two.

Q. With ring bolts on the corner to lift them up by?

A. Yes, sir."

Also, on redirect examination (pp. 55, 56):

"Q. Mr. Edmunds has asked you about these hatch covers, and the piling of them. Were they properly or improperly piled?

(Objected to.)

Q. How were they piled? A. One on top of the other.

Q. It has been testified to by one of the ship's witnesses that the hatch covers were not properly laid on the deck. Please state what you know about that, if anything?

A. I can't tell any more than one was laid down on deck and the other one on top of it.

Q. What was the proper way of piling those hatch covers? A. I suppose one on top of the other.

Q. Were they piled on this day in any unusual manner?

A. No, sir. We generally take off the after hatch first, and then the forward one on top, so that when you go to put them on, the forward one is easier to put on, and there is no chance for a man to fall down when he puts the after one on.

Q. Was there any other way of piling those hatch covers which would have rendered them any safer, that you know of?

(Objected to.)

A. Not to my knowledge, there wasn't.

By Mr. Edmunds—Q. I suppose you don't know now

positively just exactly how those hatch covers were placed, except that they were placed on top of each other, do you? A. No, sir; one on top of the other.

Q. That's all you recollect about it? A. Yes.

Q. You don't know specifically how it was done?

A. No, sir. I couldn't see on deck, of course."

He answered thus, as if he had no duty to observe them even while on deck.

This Court will notice that no man could have known less concerning the way the covers were laid than this foreman, and no witness could furnish testimony concerning them more valueless than his.

Hughes, a stevedore, testified (p. 59), on direct examination:

"Q. Do you know who took the hatch covers off that hatch that morning?

A. No, sir; I couldn't tell you. We very often take them off in the morning as soon as we start to work; but whether we did that morning or not I don't know. We always take them off and put them down level, just off the coamings—always clear of the coamings."

Chris Nelson, a stevedore, testified on cross-examination:

"Q. How many pieces were there in the hatch covering? A. Two.

Q. Those two pieces were laid on top of each other?

A. Yes, sir."

That witness could not tell correctly how many pieces of the covers there were.

John F. Fitzgerald testified on direct examination (p. 36):

"Q. Did these hatch covers project over the hatch, or were they alongside of the hatch?

A. They were forward of the hatch. They were taken off.

Q. Did the end of the hatch covers project over the hatch or not?

A. No, sir; forward of the hatch altogether. . . . . The hatch coverings sat forward of the hatch."

Also, on cross-examination (pp. 39, 40), he testified:

"Q. The hatch covering was made out of what?

A. I didn't examine that.

Q. Put alongside of the hatch? A. Put forward.

Q. Was there more than one or two of them?

A. I think there was two or three of them.

Q. That is to say, the hatch covering over the hatch was in two or three pieces? A. Yes, sir.

Q. When they took it off they put it down alongside of the hatch forward? A. Yes, sir.

Q. And piled them on top of each other; is that right?

A. One was on top of the other. I couldn't say how many was there.

Q. They were forward of the hatch opening? A. Yes, sir.

Q. But one part of them was lying alongside of the coamings?

A. There was a hole, and the hatches were taken off and set forward.

Q. Alongside of the hatch? A. Yes, sir.

Q. And the three hatch coverings, therefore, would come up a little higher than the coamings?

A. They would come about even."

Wm. B. Gray, the companion of Fitzgerald, testified, after giving his motive for coming on board, on direct examination (p. 98):

"The hatching was laying there; that is, the covering of the hatch was lying forward of the hatch."

"By Mr. Edmunds.—Q. Where were you standing, forward or aft of the hatch? A. Aft of the hatch.

Q. Which hatch was it? A. The forward hatch.

Q. The hatch covering was where? A. Forward of the hatch.

Q. Between decks, or on the spar deck? A. Between decks.

Q. You were standing on the deck above? A. Yes, sir; the main deck."

The counsel for libelant, evidently not quite satisfied with the truth of this testimony, returned to the subject (p. 100):

Redirect Examination

"By Mr. Prichard.—Q. Where did you say the hatch coverings were? A. Forward of the hatch.

Q. On which deck? A. The deck of between decks.

Q. Not on the same deck that you were?

A. No, sir."

We submit that the finding of the Court below that the covers were laid "in the usual and proper manner" is not sustained by this testimony. That libelant's witnesses indicate that they were piled in the manner usual with them is plain, and the inference so far seems correct. Not one of them testified with any distinct recollection concerning them. They were testifying a year after the accident. It is, moreover, no way likely that they observed how they were piled, or, if they did, that they had taxed their minds therewith. That, if piled, they were piled one upon another, is a matter of course, and needs no witness to say so; but that was not defining how they were piled.

O'Donnell, the foreman of the gang, was superintending the work of the stevedores—all the work they had to do. If he was superintending, he had the management of the things with which they had to do. The opinion of the Court below says (p. 152), that the covers "had been taken off that morning presumably by the stevedore gang." We think the testimony shows that fact conclusively. The stevedores, as Hughes had testified above, "always take them off." There was then a duty for them to see to it that they were properly laid, lest in case of their own negligence and of accident therefrom to either of them, they would lose recourse for damages by reason of their own contribution as coservants and as being the proximate cause.

O'Donnell testified that he "had no recollection how

they were piled, except that they were forward of the fore hatch," and "one on top of the other," and that he did not think that when piled they would come within three or four inches of the level of the top of the hatch coamings. His attention was called to the importance of the matter, and he was challenged by the question of counsel for the claimants, to say whether they were properly or improperly piled—whether there was a way by which they would be safer. He was saved from answering directly (p. 56), by the ready interposition of an objection by the counsel for the libelant, but his mind had been taxed to aid the Court to a knowledge of how they were piled, so as to determine whether they were properly or improperly piled,and when asked, immediately afterwards, how they were piled, he answered only, and thus, either evasively or stupidly (p. 55): "One on top of the other." He apparently did not know that there was a proper and improper, a safe and an unsafe, way to pile the covers. He did not dare to say that they were piled in "a proper manner." He was the head of the gang who were responsible for the method of doing it, and he gave the Court no information upon the point.

The other witnesses, Hughes, Nelson, Fitzgerald, and Gray, testified concerning the covers, but none said anything by which it could be judged whether they were piled in a proper or an improper manner. Hughes said they "put them down level, just off the coamings—always clear of the coamings," as if the point for him to establish was, to show they did not rest against nor touch the

coamings. But he did not say they were not loosely but firmly laid, so that they would not "wobble," nor necessarily tilt if anything were placed on them, and upset it, so as to fall off from them. Nelson swore only that "they were laid clear of the opening of the hatch—the fore part," but not a word that could suggest that they were laid in "a proper manner." Fitzgerald swore that they "sat forward of the hatch," were "made of wood," and that "one was on top of the other," and would come about even with the coamings, but gave no idea of how they were piled one on another.

Gray testified that "the covering of the hatch was laying forward of the hatch . . . . between decks." He located them on a deck below the main deck, where no one else did.

Thus it is clear, that there was no word from any of these witnesses as to whether they were laid properly or not. Not one of them testified that the covers lay firmly or loosely—in fact, nothing from which it can be inferred that the covers were properly piled, or to aid the Court to learn how they were laid. These were all the witnesses of libelant who testified concerning the location and piling the covers, and we believe we have given every word they uttered on the subject; and we submit that in finding that the covers were laid "in a proper manner," the Court below was in error.

If they were improperly piled, the blame attaches to his fellow-servants. If they were properly piled, then that tends to defeat any theory of libelant that it was negligence on the part of the person who left the keg upon the

top of one of them.

Libelant claims to have taken the testimony of every one of the stevedores. If this be so, they were all allowed to go, including the one who upset the keg, without interrogating any one of them concerning this very important fact in the case.

On the other hand, we quote with entire reliance upon his title to credence, the testimony of Edward Peterson, the second mate, a witness in behalf of claimants. He was distrusted by the Court below, but the basis of that distrust was not specified. He did not appear before the Court, and we submit that the reasonableness of his testimony is the criterion of its truth, as well as of that of the witnesses of libelant.

Peterson testified concerning the hatch covers, on page 115, as follows:

"Q. How many hatch covers were there?

A. Three.

Q. Were they crowning at all?

A. Yes, sir; a little crown to the hatch."

Also, on cross-examination (pp. 118, 119):

"Q. How is that hatch cover divided; into how many pieces? A. Three parts.

Q. How high are those parts each. How thick?

A. Each is about four inches.

Mr. Andros.—Q. Four inches high?

A. Yes, sir, four inches.

Mr. Holmes.—Q. How much of a crown is there to them? A. Not much, just a little.

Q. Hardly perceptible to the eye?

A. Yes, sir; you can see it.

Q. Is it not a fact that when these three hatch covers of the forward hatch are piled, the one on the other, the lower one being flat on the deck, that they stand solid?

A. They stand pretty solid; yes, sir. One of them is laid on the other.

Q. Don't they stand absolutely solid?

A. They stand solid enough so that they would not do any damage.

Mr. Andros.—Q. That is when they are piled down as they ought to be?

A. Yes, sir; when they are piled down as they ought to be. There is a ring bolt in each corner of the hatch to lift them with, and when those hatches are not laid down properly they will wabble.

. . . . . .

Q. Did you see them taken off that morning?

A. No, sir; I did not see them taken off that morning. I did not see exactly when they took them off. I see the way they were laying and I cautioned the foreman stevedore many a time to lay them hatches down as they ought to be, because I said some one will get hurt yet the way you are throwing them down.

Q. You are not speaking of the forward hatch covers?

A. Yes, sir.

Q. Did you caution him that particular day?

A. No, sir; not that particular day, but several times I done it.

Q. You did not see who took them off that morning?

A. No, sir. I know the stevedore's men took them off. My men did not take them off.

Q. You do not know that from the fact that you saw who took them off or not?

A. No, sir; I did not see.

Q. Before this accident that day had you noticed that these covers were not properly laid on the deck; this particular day and these particular covers?

A. Yes, sir, I did. I see the way they were laying, but it was so usual to see them that way nearly all the time. When I had time to do it myself I altered them.

Q. Why did you not alter them that day?

A. I had not time to do it, and it was not my place to do it.

Q. How long would it have taken you to do it?

A. It would not have taken long to do it.

Q. Would it not have taken about a small part of a minute?

A. About a couple of minutes, but I did not happen to take any particular notice of it."

This witness was the chief officer of the vessel present at that time. For what reason the Court below distrusted him is not perceptible to us. We submit that the witness is wholly credible.

In the first place his testimony is no way improbable, but is every way reasonable on its face. The witness was unusually frank, as apparently having nothing to conceal.

Second.—He was the first witness called to testify in

the case, testified specifically and strongly adverse to the libelant, and thereby challenged him to produce his whole cohort to deny the truth of anything that he said. No witness denied specifically anything that he said.

The accident had occurred on the 11th day of April, 1892, in the port of Philadelphia, and the vessel had remained at that port until the 20th or 21st of that month. (Transcript, p. 111.) She had arrived at San Francisco on the 19th day of September, 1892. The libel herein was filed on the 10th day of October, 1892. His deposition was taken in San Francisco on the 17th day of the same month, a week afterwards, and two weeks before the answer. No witness on behalf of the libelant had testified. Peterson, this witness, could have had no communication with any of the stevedores who lived in Philadelphia, and had therefore no knowledge of what any person in Philadelphia would testify. He testified unequivocally, clearly, and without variation, save in one or two cases where he had answered without sufficient thought, where he unhesitatingly withdrew his answer and corrected his testimony—an incident which in itself affirms his honesty and veracity.

Third.—By this testimony, directly critical of the methods of the stevedore, if not true, he would naturally expect he would be contradicted by perhaps more than one witness, and possibly thereby his evidence be rendered untrustworthy. Those circumstances insure the honesty and veracity of the witness. His own confidence in his

truth invites the confidence, and not the distrust of this Court.

The testimony in behalf of libelant was taken in Philadelphia in the latter part of February, 1893, and in the latter part of April, 1893, a year after the event. No testimony of witnesses on behalf of the libelant was taken until the last part of February, 1893 (Transcript, p. 80), or over four months later than Peterson's. It does not appear that the attention of any witness on behalf of libelant was directed by his counsel to this testimony of Peterson, and no one of libelant's witnesses contradicts his specific statements. If true, his testimony that although the covers had each a ring bolt in a corner, and were slightly crowned, yet, if they were laid properly, they would "stand pretty solid," was important enough to be contradicted, if it was not true. If it was not true that on previous occasions, having seen how the stevedores "were throwing them down," not carefully piling them up, he had "cautioned the foreman stevedore many a time to lay them hatches down as they ought to be, or some one would get hurt," the deposition of Patrick O'Donnell would have shown that the coverings were not carelessly thrown down, and that his attention was not called to it, and he would have directly and specifically denied it in toto. But neither O'Donnell nor any other witness contradicted this exceedingly important testimony, and we submit that with an opportunity to contradict it, and a failure to do so, the testimony, in itself not untrust-

worthy, nor unreasonable, is by that failure strengthened beyond doubt of its veracity.

And, in this connection, it will not be amiss to say that under the circumstances, if there was any part of Peterson's testimony which the libelant wished to contradict, it was not sufficient for counsel simply to merely give a different version of the event, but the only proper method of contradiction would have been by calling the witness' attention to what Peterson had already testified, and giving an opportunity to directly contradict him. If he wished to impeach the witness directly, he should have done it according to the mode which prevails in the courts of common law, and which is direct, unequivocal, and unevasive.

We believe, then, that we have a right to claim that it was not proved that the hatch covers were properly laid, but that they were loosely, improperly, and carelessly laid, through the neglect of the stevedores and their foreman, whose attention had been called to their usual method of throwing them down without regard to danger, and who had been warned of the consequences—which the superintendent did not deny.

II.

WHAT IT WAS THAT FELL.

We take no exception to the finding in the opinion of the Court below as to the location of the keg, so far as it goes. We shall, however, call the attention of this Court

to further details omitted in the opinion. Says the opinion (pp. 152, 153):

"The hatch coamings were about 9 or 10 inches high, and the covers, piled one on top of the other, were nearly flush with the hatch coamings. A keg, belonging to the ship, which had been freshly painted, was placed by some one on these hatch covers, to dry. This keg was knocked over into the hatchway and, in its fall, struck the libelant on the head, inflicting some very severe injuries. . . . . The libelant was in the lower hold, under the forward hatch, where he had a right to be, and was then in the discharge of his duties as one of the gang of stevedores.

The libelant contends that he was injured by reason of the negligence of those then in charge of the vessel in placing the keg on the hatch cover, at such close proximity to the hatchway, into which, if accidentally jarred or moved, it was liable to roll or fall, to the danger of those of the stevedore's gang who were working below under the hatchway."

It is important, then, to examine the testimony to determine what it was that fell and injured the libelant.

The testimony of claimant's witnesses, Edward Peterson, the second mate, and Henry Bannum, the third mate, was first taken; it is that on the truthfulness of which claimants rely; it is that which, having been taken several months before that of the witnesses for libelant, where in particulars it is not directly contradicted by that of the libelant, and where it is not in itself incredible, we claim is to be accepted as entirely true. We may

remind the Court that the fact that the testimony of claimants was not offered at the hearing until after that of libelant, does not in this case demand that claimants shall contradict specifically that of libelant. It is a case in admiralty, heard upon depositions entirely. Those of claimants were taken first, and thereof libelant had knowledge. If anything in those depositions was not true, it was the duty of libelant's witnesses to specifically contradict it—not the duty of claimant, after his witnesses had already given their version of the event, to assume the position of specifically contradicting the testimony of libelant's witnesses.

The testimony in behalf of libelant is as follows:

Fitzgerald, the first witness called by libelant, first said (p. 35), that a young fellow "tread on that hatch, and the hatch upset the barrel, and the barrel fell down in the hold." He then made one correction by adding: "It wasn't a barrel; it was a keg." This witness gave no further idea of what fell; no measurements, nor dimensions, no suggestion of its size, or weight, or condition, or shape.

Patrick O'Donnell testified (p. 47) that "it was a keg about the size of a vinegar barrel or a cider barrel. They generally use them for a water cask in the forecastle. I should judge about two feet high." This testimony leaves the matter indefinite, but so far as these two witnesses are concerned, it was so large that it might, properly, have been called a barrel.

Ryan (p. 57) gave no description except in saying: "I saw the keg laying there and Jensen laying down."

McLean (p. 65):

"Q. State all you know about the accident.

A. We were taking up the stage of case oil—clearing the hatch up; we were all working there together. I saw the barrel come down, and I suppose it came off the upper deck; it hit this man and knocked him down."

Then the counsel for libelant encouraged the idea that it may not have been simply a keg, but was a barrel, by his next interrogatory (p. 66):

"Q. Had you ever seen that barrel before?

A. I don't suppose so; I might, but not exactly to take any notice of it."

Sprogel testified (p. 67): "How the keg came to come down the hold I couldn't say, but it was hallooed from above, 'Under below!' Not knowing who did it, of course I jumped one side, and this gentleman tried to do the same thing, but the result was he got the keg upon his head. Whose fault it was, or anything like that, I can't say."

Chas. O'Donnell testified (p. 67): "All I know about the accident is that the man that was hurt was about two feet from me when the keg came down."

Hans Nielson (p. 69), said he "saw the keg come down."

John Brown testified (p. 70): "I saw the keg come down and strike this gentleman."

Hendrickson (p. 73) "found Jensen laying at the bottom of the vessel and the keg rolling off of him."

These witnesses give no further idea of the size of what

fell. They all testified on the same day with Fitzgerald and Patrick O'Donnell, and simply echoed the word "keg."

Wm. B. Gray testified, on page 98: "The hatching was laying there; that is, the covering of the hatch was laying forward of the hatch, and the cask sitting on the covering of the hatch; and as the mate came up to get hold of the coamings Mr. O'Donnell gave him a lift, and one of the men helping him there, I supposed him to be a sailor, tread on the end of the hatch and threw the cask up in the air, and it went down in the hold. Mr. O'Donnell was helping the mate."

Charles King testified (p. 102): "As I came back for another armload, I happened to see a cask come down the hold and I hallooed."

From this testimony of witnesses for libelant, it is impossible to conjecture what fell. According to the last two witnesses, it was as big as a cask; according to O'Donnell, the foreman, it was a barrel. In the course of the testimony some one had called it a keg, and the same word dropped, parrot-like, from the mouths of the other stevedores. It would seem to be a matter of importance as determining in part a question of negligence, or ordinary prudence. The two witnesses, Fitzgerald and Gray, whose testimony in other respects was deemed by the Court below (top of page 154) "of great importance," swear it was a barrel or keg, or cask. Their testimony in this single matter betrays such heedlessness in giving testimony as, if it should be found to be a characteristic

of their whole testimony, will render it not only not important, in the sense of the opinion, but absolutely untrustworthy; and, if untrustworthy, then only so far of importance as to persuade the Court of the untrustworthiness of all the testimony of those witnesses, and thereby induce this Court to wholly disregard it on this and on all other points.

Peterson, the second mate, a witness for claimants, testified (p. 112): "There was a little keg standing on one corner of the hatch cover, on the port corner of the hatch cover, and one of the men happened to touch the top hatch cover on the starboard side and through that it started the keg off the hatch cover, and the keg went down through the hatch, and struck the man."

And on page 114:

"Q. What sort of a keg was this?

A. A small pickle keg. There used to be pickles in it. The keg I should judge holds about four gallons."

If this witness were not trustworthy, he might also have testified that it was a barrel or a cask that fell, and, if so, have persuaded the Court that so much force would have been required to upset it, that the question of negligence in placing it in its position could never have been raised. But he told the fact as it was, and with the same frankness which characterizes his whole testimony.

Peterson testified, also on cross-examination, concerning it (pp. 122, 123):

"Q. Was the keg empty or full? A. No, sir; there was nothing in it.

Q. How do you know that? A. I could see it when it fell.

Q. Did it have its cover off? A. Yes, sir; no cover on.

Q. One of its heads off? A. Yes, sir; one of the heads was off. The hoops had been painted.

Q. You say it was a pickle keg? A. It had been a pickle keg, but used at the present time for fresh water to drink in the room.

Q. It belonged to the vessel? A. Yes, sir."

And on page 125:

"Mr. Holmes.—Q. How tall was this keg?

A. It stands about that high (illustrating).

Q. Give it in inches. A. I should say about sixteen inches."

Henry Bannum, third mate, said (p. 128): "It was a pickle keg. I think it was one of these small pickle kegs."

The testimony of these two witnesses from the ship determined that which could not be determined from the testimony of libelant's witnesses, that it was nothing like a barrel or a cask, a "keg about the size of a vinegar barrel or a cider barrel," but only a small keg, about sixteen inches high, with only one head.

III.

THE PROXIMITY OF THE KEG TO THE HATCH.

The opinion of the Court below states (p. 153): "The libelant contends that he was injured by reason of the

negligence of those then in charge of the vessel in placing the keg on the hatch cover at such close proximity to the hatchway, into which, if accidentally jarred or moved, it was liable to roll or fall, to the danger of those of stevedore's gang who were working below under the hatchway."

Thereafter, the Court only partially reviews the testimony touching the position of the keg, but does not anywhere find exactly what that position was, except that it was, quoting the testimony of Fitzgerald on page 154: "Standing right on the corner of the hatch"; and that of Gray (page 155), that "the covering of the hatch was lying forward of the hatch and the cask sitting on the covering of the hatch"; and that of Nelson, on page 157, that it was "on the forward part of the hatch covering on the port side."

On pages 166-167 of the opinion, the Court thus expresses itself: "While there is no direct testimony that the keg was placed on the hatch covers at such close and dangerous proximity to the hatchway by some one connected with the vessel, still the strong probabilities of the situation and the natural and reasonable inference to be drawn therefrom convince me that it was placed there by some person connected with the vessel."

The Court thus fails to define how close to the hatchway the keg was placed, save by the testimony of these witnesses of libelant, which does not define it, and, assuming that the testimony shows that the keg was placed close to the hatchway, hastens to a conclusion as to the person who placed it there.

But we deem it material to determine how close to the hatchway the keg was placed, and for that purpose must inquire (1) the number of covers; (2) their dimensions; (3) and in what direction they were laid, whether fore and aft, or athwart ships. The position of the keg will then be defined. The libelant, on whom the burden of proof rests, has failed to furnish the evidence needful, but much more clearly defines it than appears to have been noticed by the Court.

To determine this and the other questions arising out of it, by true answers to which only can a proper determination hereof come, we feel called upon to make the examination of the testimony of libelant's witnesses minute and exacting. We shall thereby partly show that libelant has not proven by them the allegations of his libel, and partly demonstrate the ignorance of his witnesses and their inability, or disinclination, to instruct this Court in many particulars which, though taken singly, might each be unimportant, yet taken together indicate the true characters of the witnesses. Therefrom we believe we shall have a right to claim that the testimony to sustain this suit was a late afterthought in behalf of libelant, and has been sought to support the action from witnesses who have not testified truly from memory, but from their imaginations; that those who were stevedores were unable to give testimony of sufficient weight to support the libel; that the two witnesses, J. F. Fitzgerald and Wm. B. Gray, were either not on board the vessel at the time of the accident, or if they were, were not in a po-

sition to observe, or took not sufficient notice to be able to testify to facts truly and fully enough to inform the Court; and that their story bears all the earmarks of a fabrication, in that, except in one or two general matters, their narratives are irreconcilable, each with the other, and with the testimony of other witnesses for the libelant. It is, therefore, not a wonder to us that the Court below said (p. 135): "The testimony is irreconcilably conflicting." It seems the more singular that it should be so, inasmuch as the testimony of claimants' witnesses had been for several months before them, and if the narratives of the two officers which corroborated each other were not true in every particular, the libelant's witnesses should have, and would have, in every particular contradicted them, but have in every respect failed to do.

We call the attention of the Court to the following testimony:

Fitzgerald (p. 35), testified at first:

"Q. Where was the keg standing at the time of the accident?

A. Right at the corner of the hatch."

By this answer the Court below confesses (pp. 154 and 161) to having been guided to its decision. But this answer was not true, as we shall show: (1) The testimony as to the number of covers is as follows: Fitzgerald testified (p. 391):

"Q. Was there more than one or two of them?

A. I think there was two or three of them.

Q. That is to say, the hatch covering over the hatch was in two or three pieces?

A. Yes, sir."

The witness did not know.

O'Donnell, the foreman, testified (p. 54):

"Q. Was the hatch covering in two or three pieces?

A. I think two."

That witness did not know.

Nelson testified (p. 61), on cross-examination:

"Q. How many pieces were there in the hatch covering? A. Two."

He swore without knowledge.

From this testimony, if these witnesses of libelant are to be implicitly trusted, there were but two coverings. If there were but two coverings, when they were piled they would not come so near to the level of the top of the hatch coaming as if there were three.

Peterson, the second mate, is asked and testified freely (p. 115):

"Q. How many hatch covers were there?

A. Three."

This testimony is true, and was the only source of knowledge from which the Court below found (p. 152) that the hatch covers consisted "of three pieces."

(2.) The location of the keg depends, according to the previous testimony of libelant's witnesses, upon the dimensions of the covers; for they swore that the keg was on "the forward end of the covers," and the covers were forward of the forward hatch.

On page 154 the opinion, in quoting the testimony of John F. Fitzgerald, to locate it, quotes only his statement that the key was standing "right on the corner of the hatch." The witness thus begun his story, and begun it badly, by thus testifying carelessly and not truly (p. 35), but he overcame the effect of it by his answer to the next interrogatory of counsel for libelant, who quietly ignored that answer, and, in order to have him testify correctly, asked (p. 36):

"Q. What part of the hatch covers did the barrel set on? How close to the hatch was the barrel?

A. That I couldn't say; I never measured those hatches, and I don't know how wide they were. I don't suppose they are more than about four feet anyhow, if they were that. The hatch coverings sat forward of the hatch, and this barrel was sitting on the port forward end of the hatch covering."

This answer sets completely aside the answer which appears to have defined the location to the Court below, and admitted so far for the libelant, that the keg was four feet away from the hatch. The location was apparently defined to him by the length of the covers, and they were fixed by the width of the hatch. He had "never measured those hatches," but he did not "suppose" they were more than about four feet. Plainly, then, according to his testimony, the distance being measured by the length of the covers, if they were six feet long, the keg was six feet from the hatch. The distance was the length of the

covers. He more particularly defined the location of the keg by testifying on cross-examination, on page 40.

"Q. This barrel or keg was set on the other end of the covering away from the hatch? A. Yes, sir.

Q. The end away from the hatch? A. Yes, sir."

He thus completely changed the location of the keg from being "right on the corner of the hatch," to being as far away from the hatch as the length of the covers—the "other end"—"away from the hatch."

P. O'Donnell partly corroborated this witness by saying (p. 53):

"Q. Where were the hatch coverings?

A. Forward of the fore hatch, on the main deck." That deck is different from Gray's.

Chris. Nelson testifies (p. 63):

"Q. Did you see that keg before?

A. Yes, sir. I saw it in the forenoon. A young man was sitting painting it, and set it there to dry on the hatches.

Q. Which end was it on?

A. On the forward part of the hatch covering, on the port side."

Davidson, the burton tender, whose position was at the fore hatch, through which they were working, testified (p. 69):

"Q. You did not see the barrel?

A. No, sir. If I had seen it there I would have taken it away."

This would seem to verify the testimony of those who have already sworn that it was not near the hatch. But his claim of virtue has raised suspicion in our minds, which we shall later express to the Court.

Gray testified (p. 98): "The hatching was laying there; that is, the covering of the hatch was laying forward of the hatch, and the cask sitting on the covering of the hatch."

On cross-examination, having testified (p. 99), as before quoted, that the coverings were forward of the hatch "between decks," his knowledge is again tested on redirect (p. 100) thus:

"By Mr. Prichard.—Q. Where did you say the hatch coverings were? A. Forward of the hatch.

Q. On which deck? A. The deck of between decks.

Q. Not on the same deck that you were? A. No, sir.

Q. Where was the barrel? A. It was on the deck between decks."

This witness thus created confusion. He had moved the barrel from the main deck to between decks, where only P. O'Donnell, Nelson, and King were located according to the testimony of the stevedores already quoted. If he is truthful, all the other witnesses are in error. If he is untruthful, he shows that his testimony is not to be trusted in any other respect. We think he was untruthful, and that in summarizing his testimony later and comparing it with that of others, it will be found to sustain the theory of claimants concerning the worthlessness of his whole testimony.

But other testimony aids us to learn how far the keg was from the hatch. Chris Nelson testified, on cross-examination (pp. 62, 63):

"Q. How wide do you think those hatch coverings were? A. About six feet, I guess.

Q. Then the keg would be about six feet away from the hatch coamings, wouldn't it?

A. No, sir; there are two hatches. The two coverings were laid on the fore part of the coamings—the fore part of the hatch, close by the hatch—and the keg was setting on top. It was painted and set there to dry.

Q. How big was the hatch?

A. It was pretty near square; I guess, about six feet.

Q. How many pieces were there in the hatch covering?

A. Two.

Q. Those two pieces were laid on top of each other?

A. Yes, sir.

Q. That would make it about four feet away from the hatch?

A. They were laid clear of the opening of the hatch—the fore part."

Though somewhat indefinite, it is plain that this witness intended to locate the keg at a distance of from four to six feet from the hatch.

Peterson, the second mate also testified (p. 112), that the keg was standing "on the port corner of the hatch cover," and (p. 118), that he thought the forward hatch "is about six or eight feet square."

The testimony of all the libelant's witnesses, that the keg was on the forward end of the covers, corroborated

by that of the second mate, is so far conclusive of its location.

(3.) The direction in which the covers lay was fore and aft the deck. One end was near the hatch coaming, but not against it. Hereof Fitzgerald testified (p. 36), as above, that the covers did not project over the hatch, but were "forward of the hatch altogether," and afterwards repeated that statement.

Hughes testified (p. 59) that the covers were "always clear of the combings."

Nelson (p. 63): "They were laid clear of the opening of the hatch—the fore part."

The other end of the cover, must have been away from the hatch coaming.

If the covers had lain athwartships, there would have been no end "away from the coaming." They would have lain parallel to the coaming and very near to it, though clear of it. The testimony of Fitzgerald (p. 43), that "this barrel or keg was set on the other end of the covering, away from the hatch," and (p. 36), not "more than four feet anyhow," of Nelson (p. 62), that it was on the "forward part of the hatch covering," and might be four or six feet off, is conclusive that the covers were piled forward from the hatch, and nearly at right angles to the hatch coaming. Otherwise there would be no forward part, for they would lie, not exceeding two feet in width along, parallel to the coaming, and could not be six feet nor four feet distant. The other end of the covers and

the keg sitting thereon, therefore, must have been from four to six feet distant from the coaming.

IV.

WAS IT NEGLIGENCE TO LEAVE THE KEG THERE?

From libelant's testimony, we submit, that it has not been shown that the position in which the cask, barrel, or keg was placed, was in "such close proximity to the hatchway" that "if accidentally jarred or moved it was liable to roll or fall." The law raises searching inquiries to test the question whether it was negligence on the part of the owners of the vessel to so leave it, and the answers thereto are found in the probable conduct of the person of ordinary intelligence.

Was the position of the keg one of impending danger to any one at work in the hold?

Was it placed where a person of ordinary intelligence would be likely to place it without fear of accident to any one?

Was it imprudent to place it there from any view antecedent of the event?

The position itself was not shown to be perilous. The cask or barrel or keg did not hang over the hold. It was not shown that it was nearer than four feet from the hold. It was not shown that it was on a plane inclined towards the hold. It was shown that the keg was on the further end of the covers, and that the nearer end was

not next to, but "clear from," the coamings. There was, then, some space between the ends of the covers and the coamings. It was shown that the coamings were three or four inches above the level of the covers.

If the thing that fell had been a barrel or a cask, as testified to by the principal witnesses of the libelant, the idea that its position was a menace to the persons in the hold would be so extravagant that it would never have been suggested. Libelant's witnesses testified later than those of claimants, and by the rules of law libelant would be held to their testimony, which directly contradicts the mate's, who said it was only a small pickle keg. But taking the testimony of claimants' witnesses, that it was a small pickle keg holding about 4 gallons, one-tenth as large as a barrel (pp. 114-128), and that (p. 122), it had "no cover on," and "nothing in it," and "one of its heads off," leaving it bottom-heavy, we submit that one who could foresee that it was likely from any probable cause to fall into the hold by an accident, would be one who could foresee events, fortunate and unfortunate, much beyond the ken of a person of ordinary intelligence.

If any danger lurked in the way the libelant's witnesses say the covers were laid and the keg placed thereon, it has not been testified to. It has not been testified to by any witness that the keg was in close proximity to the hatch, nor that the position in which the keg was left was one where it would not be left by any person of ordinary intelligence, or ordinary prudence. These are facts in the

case to be proven by the libelant by testimony, and not left to presumption or inference alone. That it was likely to fall down the hold from any slight force is not suggested by any testimony, by the opinion of any one, nor by the final event.

An empty keg, with no cover (p. 14) or head, stands too firmly to be upset unless considerable force is exerted. If it was of such dimensions as to be easily upset, it was the duty of the libelant to make proof thereof. No such proof was made, and it is well known that all kegs are not so. There is no presumption that a pickle keg, 16 inches high, bottom-heavy, with one head gone, is easily upset.

The libelant has not shown that it was negligence per se to place the keg on the further end of the hatch cover and away from the hatchway, on an apparently firm foundation constructed by the stevedores.

There is no testimony that the weight of the keg would make the covers tilt. The fact, if it is a fact, as testified to by Nelson, that the keg remained there unmoved for several hours, is proof that its weight alone would not cause the covers to tilt.

The libelant, we submit, has in all his testimony failed to prove any fact from which it can be concluded that there was negligence on the part of claimants in leaving the keg where it was before the accident.

"Whether a given state of facts constitutes negligence is a question of law, but whether a particular alleged negligence caused the catastrophe is a question of fact,

which it was the duty of the party asserting a claim to damages to prove."

Shearman & Redfield on Negligence, sec. 11.

Catarvissa R. Co. v. Armstrong, 52 Penn. St. 282.

V.

LIBELANT'S ACCOUNT OF THE ACCIDENT.

As the burden of proof is upon the libelant, he must likewise bear the burden which the lack of intelligence, of memory, or of veracity in his witnesses imposes upon him. We shall, at first, confine ourselves to the details of the accident as described by libelant's witnesses:

John F. Fitzgerald testified (p. 34) that he was employed along the wharf by the Pennsylvania Railroad Company, on April 11th, 1892; that he was on board the ship "Joseph B. Thomas" at the time Mr. Jens P. Jensen was injured.

"Q. What were you doing?

A. Me and another young fellow went aboard to get a piece of rope.

Q. Where were you at the time of the accident?

A. Right standing over the hatch.

Q. Which hatch?

A. The ship's hatch.

Q. Please state in your own way what you saw of this accident.

A. The mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was

helping him up—the stevedore—to get up on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he tread on that hatch, and that hatch upset the barrel, and the barrel fell down in the hold. . . . .The hatches were taken off, and then put one on top of the other, and the keg set over, and when you tread on that corner of the hatch, that turned the keg over and it rolled right down the hatch before anybody could get hold of it.

Q. Who was the young man that trod on the hatch?

A. A young man belonging to the ship.

Q. Do you know who else was on deck at the time this barrel fell?

A. Yes, sir; I knew a young fellow by the name of William Gray.

Q. What was his business?

A. Working down at the wharf there, too."

On cross-examination (p. 37), he testified that he was employed by the railroad company as a yardman; had nothing to do with the ship "more than getting cars set for the stevedores."

"Q. Had you been on board of her before?

A. Yes, sir.

Q. Do you know her officers and crew?

A. She had no crew. When they are loading at the wharf they have no crew any more than the mate, boy, and a captain sometimes."

On pages 37 and 38 he testified:

"Q. Did you get the piece of rope?

A. No, sir; this man was hurt between the time. He wanted a piece of half-inch rope?

Q. Manilla rope? A. Yes, sir.

Q. What for? A. I couldn't say.

Q. How long a piece did he want?

A. He didn't mention the length, either, that I know of.

Q. You don't know what he was going to do with it?

A. No, sir.

Q. Did you happen to get on board there just as this accident occurred?

A. Yes, sir; it was through that that the accident occurred, I think—the mate coming up to get this piece of rope for this young man.

Q. You went right aboard, and went forward, you and Gray both?

A. We went right up forward. The ladder comes there.

Q. Did you go up on the forecastle hatch?

A. Yes, sir.

Q. When you got there, did you stand there?

A. Yes, sir."

On page 40 he testified:

"Q. Where did you find the mate? A. Down between decks.

Q. What did he say? A. He said all right, that he would come up and get us a piece.

Q. To come up, he had to come from between decks up on top of the topgallant forecastle, didn't he?

A. Yes, sir; he had to get up there.

Q. How far is that—how high is that space?

A. I don't know; about five feet, I guess. It might have been more than that.

Q. He couldn't get up without assistance, you say?

A. No, sir; Mr. O'Donnell helped him up from below on to the between decks.

Q. Then some young fellow ran around there to help him up further?

A. Yes, sir; got him by the hand.

Q. And this young fellow who ran around you say was the one that stepped on the hatch coaming; is that right?

A. Yes, sir; on the hatch coverings.

Q. I suppose he could not get around there without stepping on them, could he, from where he was?

A. I don't know; I couldn't say anything about that.

Q. Where did you first see this young fellow that ran around and stepped on them? A. I saw him when he came around.

Q. Did you ever see him before that?

A. Yes, sir; he belonged aboard the ship.

Q. Where did you ever see him before that?

A. On deck.

Q. When? A. I couldn't tell you when; several times. . . . .

Q. How old was he? A. That I couldn't say; I don't know his age.

Q. Was he forty? A. No; he couldn't be forty; he wasn't that old.

Q. Do you think he was thirty?

A. I couldn't say; I don't know his age.

Q. Was he between thirty and forty or twenty-five and forty?

A. He wasn't that. I don't know his age."

On pages 42 and 43, he testified:

"Q. Are you willing to swear that you were ever aboard of that ship before? A. Yes, sir.

Q. What did you go there for? A. We went aboard; we usually go aboard with the shipping clerk; go aboard several times.

Q. What time? A. Merely going aboard of her; that is all.

Q. You had no business aboard her at all? A. Yes, sir; no business aboard.

Q. Did you ever have any talk with the crew?

A. No, sir.

Q. Did you ever have any talk with the officers?

A. Only when we meet them at Davis', the stevedore's office.

Q. You know the stevedore, don't you? A. Yes, sir.

Q. You know all the stevedores? A. No, sir; I don't know them all.

. . . . . .

Q. How old are you? A. Thirty-eight.

Q. Do you think this young man that you saw was as old as you? A. No, sir.

Q. Did you ever have any talk with this young fellow that you speak of? A. No, sir.

Q. You don't know his name? A. No, sir; I do not know the mate's name, only he is the mate."

W. B. Gray testified (p. 98), that he was clerk of the Pennsylvania Road, remembered going aboard the ship "Thomas" on April 11th, 1892, with Mr. Fitzgerald, and was on board at the time the accident happened to Mr. Jensen.

"Q. State in your own way all you know in reference to it. In the first place, how came you to go on board?

A. I went aboard for a piece of rope. I asked Mr. O'Donnell, the boss of the stevedores, and he said he hadn't any, and called to the mate. The mate said that he would get me a piece. The mate was about climbing up the forward stanchion of the ship to the main deck. The hatching was laying there; that is, the covering of the hatch was laying forward of the hatch, and the cask sitting on the covering of the hatch; and as the mate came up to get hold of the coamings Mr. O'Donnell gave him a lift, and one of the men helping him there, I supposed him to be a sailor, tread on the end of the hatch and *threw the cask up in the air* and it went down in the hold. Mr. O'Donnell was helping the mate.

Q. That is all you know of the accident?

A. Yes, sir."

On cross-examination (p. 99):

"Q. Where were you standing, forward or aft of the hatch? A. Aft of the hatch.

Q. Which hatch was it?

A. The forward hatch, and the hatch covering was between decks.

Q. You were standing on the deck above? A. Yes, sir; the main deck.

Q. The mate was coming up out of the lower hold?

A. Yes, sir.

Q. On the forward stanchion? A. Yes, sir.

Q. When the mate had got about as high with his head as the top of the hatch in the between decks, O'Donnell and another man attempted to help him?

A. I saw O'Donnell attempt to help him.

Q. Some one stepped on this hatch covering?

A. Yes, sir.

Q. That produced the fall of the barrel? A. Yes, sir.

Q. Are you prepared to swear with any certainty who it was that stepped on that hatch covering? A. No, sir.

Q. Are you willing to swear that the other man who was assisting O'Donnell was a sailor connected with the ship? A. No, sir."

On redirect (pp. 100, 101), he testified:

"Q. Where was the mate coming to? Was he coming up to the deck where you were?

A. No, sir; he was coming up to the deck of between decks.

Q. So that you were on the deck above, the deck to which the mate was coming? A. Yes, sir."

On recross-examination (p. 101):

"Q. How many men were between decks?

A. That I cannot say; I know there were some boys

around the ship. I cannot say whether they were between decks or where they were.

Q. This man who tried to help the mate up—was he a man? A. Yes, sir.

Q. Was he a full-grown man?

A. Yes, sir; he was not between decks.

Q. Who was the man that was between decks?

A. The man that upset the cask.

Q. Was he a full-grown man?

A. That I could not say. From where I was standing I could not see him.

Q. You did not see him at all, then?

A. No, sir."

It is the version of these two witnesses that was relied upon by the Court below. But a minute examination of the testimony of these two witnesses will show that there is not such consistency as is requisite to form one version of their testimony but rather that there are two versions. The testimony of Fitzgerald is one narrative; that of Gray is another.

The story of Fitzgerald on the direct examination (p. 38), is this:

"Q. Did you go up on the forecastle deck?

A. Yes, sir.

Q. When you got there, did you stand there?

A. Yes, sir."

He testified (p. 40): "We found the mate down between decks and asked him for the rope. He said all right, that he would come up and get us a piece. He had to come

from between decks up on top of the topgallant forecastle. He couldn't get up without assistance. O'Donnell helped him up from below on to the between decks."

We analyze the testimony of each of these witnesses, Fitzgerald and Gray, in order to compare them.

FITZGERALD'S.

(1.) He and Gray went aboard to get a piece of rope.

(2.) That they were standing right over the hatch at the time of the accident.

(3.) That the mate was between decks. He started to come up to the main deck.

(4.) That O'Donnell was helping him to get up there.

(5.) That a young fellow started to run around to help the mate to the main deck, and trod on "the hatch, and that hatch upset the barrel and the barrel fell down the hold."

(6.) That the barrel or keg was "right on the corner of the hatch" on the main deck.

(7.) The hatches were put one on top of the other and the keg set over.

(8.) That the young man that trod on the hatch belonged to the ship.

(9.) That he saw him when he came around.

(10.) That the coverings were forward of the hatch altogether, and not more than four feet from the hatch.

He added on cross-examination:

(11.) That he and Gray went up on the forecastle hatch and stood there at the time of the accident.

(12.) That he asked the mate for the rope, and the mate said all right; that he would come up and get us a piece.

(13.) That he couldn't get up without assistance, and O'Donnell helped him up from below to the between decks.

GRAY'S.

(1.) He went aboard for a piece of rope.

(2.) Was standing (p. 99), aft of the hatch on the main deck.

(3.) The mate was coming up out of the lower hold (p. 99).

(4.) That O'Donnell gave him a lift.

(5.) That some one trod on the end of the hatch and threw the cask into the air.

(6.) That the cask was on the covering forward of the hatch between decks (p. 99).

(7.) Does not say that there was more than one covering.

(8.) That he supposed the man who trod on the hatch was a sailor.

(9.) That from where he was standing he could not see the man that upset the cask.

(10.) That the coverings were forward of the hatch.

(11.) He says nothing of being on the forecastle deck, but says he was on the main deck.

(12.) That he asked O'Donnell (not the mate) for the piece of rope. He said he hadn't any and called to the mate. The mate said he would get a piece.

(13.) That the mate came up so as to get hold of the coamings and O'Donnell helped him.

The two versions differ in these: Fitzgerald says (2) they were standing right over the hatch, and Gray (2) that he was standing aft of the hatch.

Fitzgerald says (3) that the mate was between decks, and Gray, (3) that he was coming up out of the lower hold. Both say (5) that the man ran around and trod on the hatch, but Gray confesses he did not see him (p. 102.)

Fitzgerald says (6) the barrel was "right on the corner of the hatch" on the main deck, which is clearly proven not to be true; Gray says (6) that it was "forward of the hatch, between decks," which is entirely uncorroborated. Fitzgerald says (7) the coverings were piled one on another; Gray speaks of only one covering. Fitzgerald says (8) the young man who trod on the hatch belonged to the ship; Gray, (8) that he supposed he was a sailor. Fitzgerald says (9) that he saw the man "when he came around;" Gray, after some cross-examination and after saying (p. 101) that he "cannot say whether the two boys were between decks or where they were," said by way of antithesis that the person who trod on the cover was a man, that is, not a boy, and, finally, that from where he was standing he "could not see him." If, as Fitzgerald said (p. 40), they were standing together on the topgallant forecastle, if Gray could not see the man, Fitzgerald could not have seen him. If, as Gray repeatedly swore (p. 99), he was on the main deck, because he was "aft the fore hatch," and "there was no deck above him at all" (p. 100), then he was

on the deck below that on which Fitzgerald stood, and the man who trod on the covers was on the same deck with himself, and he must have seen him if he had been there, and Fitzgerald could not have seen him, because he was looking down the fore hatch on the topgallant forecastle.

Such differences warrant a conclusion that the testimony of libelant's witnesses is irreconcilable, and that the testimony of either, uncorroborated, is too weak to sustain the libel.

In order to sustain a judgment of $6,000.00 against claimants, we submit that they have a right to demand that witnesses against them speak certainly, intelligently, and unequivocally. If the version which two of libelant's witnesses purport to give is to be trusted in preference to that which two of claimant's employes give, they claim that the story of each shall in all material points be sustained by the other. The sum of the whole is made up of testimony of small particulars, and if in those particulars these two witnesses vary, it is suggestive that the story is one not from the memory of either, but is the testimony of two persons lugged in to sustain a theory imperfectly detailed to them beforehand, and is fictitious. Both stories cannot be specifically true. If they are specifically inconsistent, they may be so far specifically untrue; they cannot then support each other, and there is no such thing as a version by these two witnesses.

But the preference expressed by the Court below in favor of these witnesses is because, the opinion says (p. 156), "it is corroborated by the testimony of the foreman of the

stevedore's gang, and at least two of the stevedores themselves." The other two stevedores are afterwards named as Martin Ryan and Chris. Nelson.

We ask the attention of the Court to the testimony of each of those witnesses:

P. O'Donnell's testimony is set forth in general terms in the opinion of the Court (p. 156), thus: "After I got the stage up, I used short wood to chock it, and the second mate of the ship jumped down to see how much short wood I was using. He came down to see whether I was using too much. He stood a minute and said it was all right. He started to climb up the forward stanchion of the forward hatch. He got up as far as the combings, when he put his hand over and sung out to a boy, to the best of my knowledge, to give him a hand to pull him over, and that's all I could see of it. I gave him my hand, put it under his foot to help him over, and I heard somebody halloo 'under,' and when I looked down the hatch I saw this man laying on the floor of the ship—that is, Jensen." On cross-examination, he reaffirmed the statement that the mate (meaning the second mate) was in the between-decks. He was unable, however, to say who it was that went forward to help the mate up, as he was in the between decks.

This account gives no substantial verification to the story of either Fitzgerald or Gray, except that he says that "the second mate started to climb up the forward stanchion of the forward hatch. He got up as far as the coamings and sung out to a boy, to the best of my knowl-

edge, to give him a hand to pull him over, and that's all I could see of it. I gave him my hand—put it under his foot to help him over, etc." But there is other testimony of O'Donnell from which this Court may judge of his intelligence, the value of his testimony, and to what extent he corroborates the stories of Fitzgerald and Gray.

Fitzgerald testified (p. 40), as quoted above, that he asked the mate for a piece of rope; found him between decks; that the mate said, "all right, that he would come up and get us a piece." O'Donnell testified (p. 47), as quoted in the opinion, that "the second mate of the ship jumped down to see how much short wood I was using. He came down to see if I was using too much. He *stood there a minute*, and said it was all right. He started to climb up, etc."

If Fitzgerald asked the mate for a piece of rope, he must have called out from the topgallant forecastle to where he said the mate was; that is, between decks. If he did so, as O'Donnell said the mate came down there and "stood there a minute," O'Donnell would have heard Fitzgerald ask, and if the mate replied, O'Donnell would have heard the reply. But of this fact—which Fitzgerald must have deemed as of exceedingly great importance, as he testified (p. 38), that "it was through that [his coming on board for a piece of rope] that the accident happened, I think—the mate coming up to get this piece of rope for this young man [Gray]," O'Donnell gives no evidence of consciousness. The mate's presence was for only "a minute," and as soon as he had satisfied himself that O'Don

nell was not using too much wood for dunnage, he began climbing up. If it had happened, if Fitzgerald had called out to the mate down between decks, and the mate had replied, as Fitzgerald said he did, O'Donnell would have heard it. If it had been true, O'Donnell would have been asked concerning it and would have verified it. O'Donnell did not speak of ever having seen or heard of Fitzgerald. He would have done so had it been a fact.

Fitzgerald said (p. 40) that O'Donnell had "helped the mate up *from below* on to the between decks, and that "then some young fellow ran around there to help him up further."

O'Donnell testified (p. 50), on cross-examination:

"Q. Was that the ladder that the mate was coming up?

A. No, sir; the mate wasn't down in the lower hold."

Here the testimony of Gray may be pertinent. He testified that the mate was in the lower hold. Thus (pp. 100, 101):

"Q. Where was the mate coming to? Was he coming up to the deck where you were?

A. No, sir; he was coming up to the deck between decks." The only place *below* the between decks, was, according to O'Donnell's cross-examination (pp. 50, 51), the lower hold.

Here, then, is a direct contradiction between Fitzgerald and Gray on one hand, and O'Donnell and Gray on the other. This certainly is not corroboration.

Moreover, Fitzgerald has testified with particularity that the man who came up from below was the mate, for

he called to him and asked him for a piece of rope. Yet when called upon, on cross-examination to identify the young man that he said (p. 43) trod on the coverings, he testified (p. 44):

"Q. Did you ever have any talk with this young fellow that you speak of? A. No, sir.

Q. You don't know his name?

A. No, sir; I do not know the mate's name, only he is the mate.

Q. The young fellow wasn't the mate, was he?

A. No, sir; not that I know of.

Q. Nor the second mate?

A. I couldn't say whether he was the second mate or not.

Q. The young fellow was neither one of the mates?

A. I don't know whether he was the mate or not.

Q. If he ran around to help the mate, of course he wasn't the mate.

A. No, sir; the one in the hold I call the mate; the one that was down between decks that I always called the mate."

Scarcely any testimony could be more direct proof that he did not know the mate or the second mate from anyone else. His testimony then that he asked the mate for a piece of rope, or saw the mate coming up from below, is absolutely worthless.

O'Donnell corroborated Fitzgerald only in his ignorance of the fact whether the mate came up from between decks or not. He testified, on cross-examination (p. 54):

"2. Was it the first or the second mate that was coming up the hatchway that you are speaking of?

A. It was the second mate, *as far as we understand it.*"

The claimants believe that they have a right to protest against the interpretation of such testimony, as a basis for finding that an officer in their employ had any part in an accident for which they are by the judgment herein held responsible in large damages.

Gray testified (p. 98):

"I asked Mr. O'Donnell, the boss of the stevedores [for the piece of rope], and he said he hadn't any and called to the mate."

This witness was not content with leaving the testimony of the alleged transaction as Fizgerald had told it. Fitzgerald had said that he found the mate between decks, and that it was he who asked the mate for it. Now, Gray averred that it was he who asked for it, and he asked O'Donnell first, and O'Donnell said he hadn't any, and called to the mate. (p. 98.)

Gray does not corroborate Fitzgerald in his story, but tells a different one. Fitzgerald does not corroborate Gray in his story, but tells a different one. O'Donnell does not corroborate either Fitzgerald or Gray in their stories about the piece of rope, does not allude to Fitzgerald, does not allude to Gray, does not allude to the piece of rope. O'Donnell's consciousness was not awakened by any interrogatories concerning either of these applications, and he volunteered nothing. If the testimony of either Fitzgerald or Gray had been true on this point, it is

most probable that O'Donnell would have corroborated both, or one at least. He corroborated neither.

Fitzgerald said that the mate had got up on to the between decks by the help of O'Donnell, but O'Donnell denied it, and said he helped him only high enough to catch hold of the coamings, when he left him dangling there, and gave no heed to the further progress or ultimate arrival of the so-called mate. But we call attention to further testimony of Patrick O'Donnell in proof of the weakness of his testimony, and to sustain our claim that testimony so fragile should be estimated only at its proper value. The witness was evidently brought in without any previous knowledge that he was to be examined or cross-examined, for he said, in excuse for his inability to testify to facts which, plainly, should have been within his knowledge (p. 48): "Of course I never thought I was going to be cross-questioned on it, or I might have remembered more." But he was not being cross-examined, for the answer was on the direct examination. His testimony showed him to be either exceedingly ignorant, or exceedingly careless of his duties. Whichever was the case, his testimony bears the impress of a story the details of which he had forgotton, and now imagined and told to help out an unfortunate fellow-stevedore.

On page 46 he said he had no record anywhere of the name of the men under his employ; and on another day (p. 84) produced a list from a book kept by some one else, one Charles Hanson; the time-keeper who did not

testify; he said (p. 47) that the keg was as big as a "vinegar barrel or a cider barrel"; (p. 48) he didn't know whether or not all of his gang were down in the hold; he said (pp. 48, 52) that he had only one man between decks with him, yet Chris. Nelson, another witness, especially relied on in the court below as a corroborating witness, said (p. 102) that he was in the between decks; and Charles King testified (p. 105):

"Q. How many men were at work there with you?

A. On my side there were *three men and* the foreman."

That was two more than O'Donnell testified to. If this was true, O'Donnell did not testify truly.

O'Donnell testified (p. 46) on direct-examination: "Q. Do you know how many you had [in the gang]?

A. . . . . I had fourteen men, I should judge."

On page 49 he said: "To the best of my knowledge I suppose there was about twelve men" in the lower hold, one on the forecastle hatch, and "one in between decks with me." That would be 12 plus 3 equal 15. If King was right, there were 12 plus 4 equal 16. Besides these, there was Gabel (p. 74), who testified that he was "out by the engine on the wharf." That would make 17. The point we make here is simply that according to libelant the number of men in the gang and the location of each would seem to be of great importance in determining the fact as to who trod on the covers. But by his own witnesses he has mistaken the number, and he (O'Donnell), so strongly relied upon, plainly testified without knowledge

or forethought or intelligence, and as he put little value upon his own knowledge, we claim that this Court should put as little value upon his testimony. One of his duties was to see that the work done by his gang was properly done. If it was of importance to see that the hatch covers were properly piled, it was his duty to see that it was so done. He had been cautioned by the second mate to lay them properly or some one would get hurt, and this fact had been testified to by the second mate, several months before (p. 119), and also that the stevedores "put them down anyway at all, as they were always in a hurry"; yet, when called to testify he not only did not in any way deny the truth of the story of the second mate, but when his attention is courageously called by counsel for claimants to this testimony of the second mate, and asked what he knew about the piling the covers, he said (p. 55): "I can't tell any more than one was laid down on deck and the other on top of it"; and being asked to tell what was the proper way of piling them he answered: "I suppose one on top of the other." He did not know how they were piled that day; did not deny they were improperly piled, nor did any one else; he did not know how they should be piled, nor if there was any way of piling them which would have rendered them safer (p. 56).

We submit that the testimony of O'Donnell corroborates no version of the accident adverse to the claimant, but arrests the attention of all who read it by its proof of his ignorance, indifference, and evident willingness to help his coservant to the prejudice of claimants.

In order to see to what extent the testimony of Fitzgerald and Gray and O'Donnell is supported by the other two stevedores, Martin Ryan and Chris. Nelson, we will quote from their testimony.

Martin Ryan was a witness who was thought by the Court below to corroborate the testimony of the previous witnesses, Fitzgerald and Gray. An examination of the language of the opinion and the complete testimony of Ryan leads us to the conclusion, that his testimony appeared to corroborate on a single point, to-wit, that it was the second mate who climbed up from between decks. But its weakness will more clearly appear from quotations.

He testified, on page 57, that he was in the lower hold "working, tearing up an oil stage; that he did not see Jensen struck by the barrel." He was then interrogated, as follows:

"Q. How did you learn of the accident?

A. All I saw, I saw the second mate climbing up from between decks on the upper deck, under the gallant forecastle. The next I heard was, 'Look out below.' I jumped into the wing of the vessel to get out of the way, and I looked around and I saw the keg laying there and Jensen laying down."

The distance from the bottom of the lower hold to the main deck was eighteen feet, according to O'Donnell (pp. 50-51). From the lower deck to the main deck was about seven feet. (O'Donnell, p. 50.) It was then twenty-five feet from the bottom of the lower hold to the main deck, and the only way to see from the former to the latter

would be by standing directly under the hatchway, and, as the hatchway was only about 6 feet square, by throwing back the head, with an exertion so as to look nearly perpendicularly upward. It must be the exertion of a leisure moment, and not when one is "working, tearing up an oil stage." But when one is anxious to testify, he may narrate things improbable. His anxiety may also allay his solicitude lest he speak anything but the truth. In that attitude Ryan said he "saw the second mate climbing up from between decks." He saw only the second mate. He did not see the barrel or keg coming down, but after the keg had begun to fall down the hold, and had only twenty-five feet to fall, the next he heard was, "Look out below," After the keg had started, and he had heard the warning voice, and not before, he "jumped into the wing of the vessel to get out of the way." The story is not probable. But he was cross-examined, and then testified (p. 58):

"Q. You saw the mate coming up the *ladder* from between decks. A. Yes, sir; climbing up.

Q. Just about that time you heard somebody halloo out, 'Look out from under'?

A. 'Look out below.'"

He was asked directly if he saw the mate coming up the *ladder*. He answered, "*Yes*, sir; climbing up."

He was asked if somebody hallooed, "Look from *under*," but he remembered differently. Some one did not say that, but said, "Look out *below*." The witness was over-nice, and thereby excites distrust. In *this* particu-

lar, he swore contrary to O'Donnell, who testified (on p. 53):

"Q. You heard somebody halloo, or was it you that hallooed, 'Get from under'?

A. No, sir; somebody on the forecastle deck hallooed, 'Under.'"

And the second mate testified (p. 114) that he sang out, "Stand from under."

Inasmuch as the witness was particular to show the counsel that he was wrong in the assumption in his question, we must be equally particular in showing that the witness differed from the one he is thought to corroborate.

On the same page (58) Ryan was asked:

"Q. Was it the second mate or the mate that you saw going up the ladder?

A. The second mate."

This testimony does not corroborate, but contradicts, that of O'Donnell, who said (p. 47), that the second mate "started to climb up the stanchion," not up the ladder. He also said (p. 50) that you get from the lower hold to the between decks "by a ladder"; and also:

"Q. Was that the ladder that the mate was coming up?

A. No, sir; the mate wasn't down in the lower hold."

We claim that the testimony is neither corroborative of the testimony of any other witnesses, nor probable, nor true. It does not corroborate any witness as to whether it was the second mate who climbed the stanchion, for (1) there can be no corroboration of testimony in itself value-

less—that of Fitzgerald and O'Donnell, who did not, either of them, know who was the second mate, and therefore could not be heard to testify that he was the second mate who they said climbed the stanchion; and (2) the story that he, who did not appear to have knowledge greater than Fitzgerald or O'Donnell, saw the second mate climbing up twenty-five feet directly above him, is plainly only an endeavor to testify something of importance; and (3) he saw the second mate on a ladder which was not there, and thereby directly contradicted the witnesses he was said to corroborate.

We next examine the particulars in which Cris. Nelson is said to corroborate Fitzgerald and Gray. In the very beginning of his testimony, as quoted in the opinion (p. 157), Nelson said: "There was no ladder in the hatch. The second mate came down the stanchion, sliding down the stanchion, and he went up the same way"; thus in his first breath contradicting Ryan, his fellow, corroborating witness. Nelson further said (p. 60): "And as he went up this keg came down. He [the mate] hallooed to one of the boys or young men belonging to the ship to help him out of the hatch, and Mr. O'Donnell, the foreman, helped him up, and the keg came down, and that's all I know." This looks as though he had heard the story of the other witnesses, and intended to corroborate their testimony.

He further testified that he did not help take the hatch covers off, and added: "I know where the hatch covers were laying at." But he did not volunteer any information as to how they were laid, nor was he asked it by libel-

ant's counsel. If they had not been laid as the second mate had specifically testified several months before, Nelson, who knew where "they were laying at," could have disputed the fact, and have put our witnesses to shame. He knew. He was not asked. He did not tell. He, therefore, by his opportunity, and, by his silence, corroborated the testimony of Peterson in that regard.

On cross-examination, Nelson testified (p. 61):

"Q. While he was going up this stanchion this keg came down?

A. Yes, sir; after he got on deck, as he got over the coamings on deck.

Q. That is to say, you say he was all the way over the coaming?

A. He got on top of the coamings, and I saw the keg coming down. That's all."

Then, according to Nelson, it was not as the mate went up that the keg came down, as he had just testified ,but after he had got there. He testified further (p. 62):

"Q. You don't know whether he stepped on the coverings or not?

A. I know that he had to get on them to get on deck.

Q. Do you know that his feet were over the coamings?

A. Yes, sir; as he got on top of the coamings the keg came down; that's all I know.

Q. Then your impression is that the second mate must have stepped on that hatch coaming? A. Yes, sir.

Q. As soon as he stepped on the hatch coaming, that upset the keg; that's your idea, is it? A. Yes, sir.

Q. Did you see that keg before?

A. Yes, sir; I saw it that forenoon. A young man was sitting painting it, and set it there to dry on the hatches."

This witness, instead of corroborating the version of Fitzgerald and Gray, has thus uttered a new theory of his own. They testified that the keg—cask—was thrown down by some one running around to help the mate. Nelson now says that his idea is that the mate himself "upset the keg." He certainly does not corroborate the testimony he was cited to corroborate, save in saying that it was the second mate who was between decks. The other witnesses, Fitzgerald and O'Donnell, admitted that they could not identify the second mate. It does not appear that Nelson was doing other than repeating what he had heard, or that he knew the second mate from any one else. He directly contradicted O'Donnell in his story of the position of the second mate. He said (p. 61) that the mate "got over the coamings on deck"—"all the way over the coamings."

O'Donnell said as distinctly (p. 54), on cross-examination:

"Q. And he had not got up all the way, as I understand, at the time this keg upset or fell down?

A. He got up far enough to put his hand over the coamings and sing out for help.

Q. I mean that he was not up on the deck?

A. No, sir; his body was about from the deck to the top of the hatch coamings, and his leg was below."

Of course, Nelson could not corroborate O'Donnell and maintain a separate theory of his own, and one so directly opposed to that of Fitzgerald and Gray. He showed himself to be a very willing and zealous witness, as he attempted to corroborate Fitzgerald in what he said of the person who was said to have helped the second mate up, and at the same time, unasked, volunteered further testimony about the boy and the keg, as follows (p. 63):

"Q. What was this young man doing that helped the mate up? A. He belonged to the ship.

Q. What was he doing?

A. Working around the deck, mostly at anything.

Q. What was he doing at the time?

A. I don't know exactly what he was doing at the time, but I know one of the two young men had been painting that keg and set it on top of the hatches to dry.

Q. You don't know that it was this young man?

A. No, sir; because the second mate hallooed for help to get him out of the hatch.

Q. You didn't see the young man? A. No, sir."

His testimony then that the person, not who threw the keg down, but, who helped the second mate up, belonged to the ship, was thus rendered valueless by his own admission that he did not see him. It is as clear, too, that he did not see the second mate step on the coverings, for that was impossible.

This particular examination of the testimony of the witnesses on whom the Court below relied demonstrates very clearly that there was no single important fact—

save such as is admitted by claimants, to-wit, that the libelant was injured by the falling of a small keg—proven by the concurring testimony of any two of the libelant's witnesses. We cannot tell, from the testimony of any two of them, by whom the keg was thrown down the hold. Fitzgerald alone professes to have seen the man "as he came around." Gray could not see him. Nelson said his impression was that the second mate did it, but he could not see. If his theory were true, then all that Fitzgerald said about the man that "belonged to the ship" running around is a mere fabrication. No other of the libelant's witnesses gives any clue to the way out of the darkness.

Upon one part of the evidence of Fitzgerald we have not, perhaps, sufficiently dwelt, and that is that wherein he testifies that the person who ran around and trod on the covers belonged to the ship. We have,as we believe, clearly shown that in other details the testimony of Fitzgerald thus far noticed is uncorroborated and untrustworthy. His testimony on this point is equally so. His whole testimony, as it has been examined and criticised, suggests that neither he nor Gray were on board the vessel at the time of the accident; that they were an afterthought subsequent to the taking of the deposition of the second and third mates, when it was clear that there was no one on board the vessel at the time of the accident who could testify that any one belonging to the vessel had anything to do with throwing the keg down the hold.

Note the particulars which cast suspicion upon their testimony. They were not employed on the ship (p. 34),

but were employed along the wharf by the Pennsylvania Railroad Company. Their business, then, was on the wharf. They said they had no business at all on the ship (p. 42).

Fitzgerald said (p. 34.): "Me and another young fellow went aboard to get a piece of rope."

On cross-examination (p. 37) he testified:

"Q. You went aboard of her with somebody else to get a rope. A. Yes, sir.

Q. Where did you expect to get a piece of rope there?

A. From the mate.

Q. Did you see him and ask him for it? A. Yes, sir.

Q. What were you going to do with it?

A. It was for this other young fellow, Gray.

Q. What did he want it for?

A. I couldn't tell you."

This has the aspect of a mere excuse. He threw on Gray the duty of telling what the rope was wanted for, but Gray did not tell. Then, like a witness who goes into useless detail for the sake of appearing to be a true witness, he added, without being asked (p. 38): "He wanted a piece of half-inch rope.

Q. Manilla rope? A. Yes, sir."

He knew the exact size wanted, but not its use. This adds to the improbability of the story. Then he began to shield himself from self-betrayal by denying knowledge of further details.

"Q. What for? A. I couldn't say.

Q. How long a piece did he want?

A. He didn't mention the length, either, that I know of.

. . . . . .

Q. Did you happen to get aboard there just as this accident occurred?

A. Yes, sir; it was through that that the accident occurred, I think; the mate coming up to get this piece of rope for this young man."

They went right aboard, he said, and he and Gray went up forward on the forecastle hatch and stood there. Then the accident happened. They did not get the rope, he said (pp. 37, 38). Then he said, the young man who trod on the cover "belonged aboard the ship" (p. 41). He had seen him before on deck—"couldn't tell you when, several times."

"Q. What was he doing when you saw him?

A. He was coming around to help the mate: knocking around the deck and one thing and another—I couldn't say what he was doing."

Interrogated as to his age, he could not say; "He could n't be forty."

"Q. Do you think he was thirty?

A. I couldn't say; I don't know his age."

He could not tell whether he was twenty-five.

"Q. Was he a man?

A. He was a young man; yes, sir.

. . . . . .

Q. Do you know his age, whether he was sixteen or forty? A. I know he was n't forty.

Q. Are you sure he wasn't sixteen?

A. No, I couldn't say that."

He was sure of one thing only—that the man was n't forty. From this it is quite evident that he did not intend to swear that the young man was one of "the boys" belonging to the ship. The witness himself was thirty-eight (p. 43), and he did not think the young man as old as himself. He further testified (p. 42) that he never had any talk with the crew; that he did not know all the stevedores (p. 43); that he never had any talk with the young man; did not know his name. He testified (p. 44):

"Q. The young fellow wasn't the mate, was he?

A. No, sir; not that I know of.

Q. Nor the second mate.

A. I couldn't say whether he was the second mate or not.

Q. The young fellow was neither one of the mates?

A. I don't know whether he was the mate or not?

Q. If he ran around to help the mate, of course he wasn't the mate.

A. No, sir; the one in the hold I call the mate—the one that was down between decks that I always called the mate.

Q. You didn't know in what capacity this young man was at all? A. No, sir.

Q. You don't know where he belonged to?

A. He belonged aboard the ship.

Q. Where did he live? A. Aboard the ship.

Q. Are you sure of that? A. That is what they say.

Q. Who said so?

A. That is what I say myself. I don't know whether he lived there or not. Sometimes they live ashore. Sometimes they sleep aboard and eat ashore.

Q. Where did you get this information from that he belonged to the ship?

A. Nothing, only seeing him knocking around there, that's all.

Q. You didn't know every man in the stevedore's gang, did you?

A. No, sir; only by sight.

Q. Did you know them all?

A. Those that knocked around the wharf I know—the stevedore's men—by eyesight.

Q. Did you know every man in the stevedore's gang working there that day?

A. No, sir; I couldn't swear to that."

Thus driven to the wall, he confessed that he did not know whether the young man was one who belonged to the ship or a stevedore.

The only one, then, who testified directly that the man who trod on the covers "belonged to the ship" was Fitzgerald, and his testimony on that point we believe utterly worthless. We submit that, in this account of the accident by witnesses for libelant, there is no trustworthy, consistent, corroborated, or probable version, beyond that of the fact that a keg, or cask, belonging to the vessel, that had been standing most of the day on one of the hatch covers, not nearer than the length of the covers

from the hatch, had been upset and thrown down the hold by some one who trod on the covers. That person is not identified, nor in any way indicated. But in this account of the accident by libelant's witnesses, it is to be noted what occurred, according to Fitzgerald (p. 35), when some one who "ran around," and, according to Gray (p. 98), "trod on the end of the hatch and threw the cask up in the air, and it went down in the hold."

If this person ran, and, in running, trod upon the hatch cover, the act must necessarily have been like that of jumping, with one foot, for the action of running and landing on one foot is simply the same as jumping. The act was not then simply that of treading upon the hatch cover with a light, or with a usual pressure, but must have been a throwing of the whole weight on the end of the cover with an increased pressure, and one much augmented beyond that of simply treading upon it. It was only by this extraordinary, unusual, improbable, and therefore unforeseen pressure, that, according to their testimony, the covers were disturbed or anything placed upon them thrown down. It did not, according to any one's testimony, occur readily, nor soon after the keg was placed there. It did not occur, save by the pressure of unusual and extraordinary force. As we have seen above, the covers did not come within three or four inches of the top of the hatch coaming, and were laid entirely clear of the coamings. The keg could not rise above the level of the covers and over the coamings without being subject to

some extraordinary force. If force enough "to throw it up into the air" was requisite in order to bring about the accident, then no place on the ship could have been chosen without the charge of negligence.

If, contrary to this evidence, defining the position of the hatch covers, it could be argued that they were placed athwart ship, and not fore and aft, and as possibly the distance of the "port forward end away from the hatch" was less than six feet ,still the incontrovertible fact remains that the force necessary to bring about the two results of "tossing the keg into the air" and causing it to fall into the hold, must have been extraordinary, and such as could not have been foreseen, or anticipated, or counted among the natural results, against which it was the duty of claimants to provide, and failure to provide against which can be declared to show culpable negligence.

There is no testimony that the weight of a man would move them, if properly laid. There is none that anything less than the weight of a man thrown upon them with the force of a man running could have moved them.

If the weight of the keg, or of a man, did not cause the cover to tilt so that the negligence of the stevedores was betrayed, then the insecurity of the covers as a place on which to lay the keg was not apparent to the employee of the ship, and the placing the keg there in a position which, in an unusual and improbable event, was proven to be not wholly secure, but the insecurity of which was the work of the stevedores, would not make the ship responsible for the result.

It is no way probable that the covers could not be laid so as not to tilt, for that would be a perpetual menace to any one who approached them, and the fact, if a fact, could and would have been, clearly proved.

If the covers did not tilt when lightly touched (and the libelant has offered no proof of such fact), then the covers were laid firmly enough. If so, then if libelant would have the court to believe that it was negligence to place an empty keg on the further end, it is not a conclusion that can be reached from presumption, but should have been proved clearly.

Whether there was any tilting of the covers as laid, is a material fact. If there was any visible, or probable it might have been negligence to leave the keg there. If none appeared, then there was no negligence. The libelant has failed to prove such a fact, necessary which is in order to hold respondents liable for an injury caused by one of the stevedores.

From this testimony for the libelant it is clear, that it could not have been negligence per se to place the keg in that position. If such was the fact, it was the duty of the libelant to introduce further testimony to make it clear to the Court.

If properly laid, the covers would not, without extraordinary force, tilt so as to upset the keg, or set it rolling; and there is no basis in the testimony for the contention that the keg was placed by a ship employee in a place where, if any one trod on, or jarred the hatch covers, it

would probably roll or fall to the danger of any one in the hold.

VI.

CLAIMANT'S ACCOUNT OF THE ACCIDENT.

Before proceeding further on the lines of the opinion, we deem it proper to quote the testimony offered in behalf of claimants. Only three of the crew were available to testify. One was the carpenter, Ole Larsen, who said (p. 147) that he did not see the accident; Peterson, the second mate, and Hannum, the third mate, testified fully concerning it. Their testimony was distrusted in the court below, yet we now call the attention of this Court to it, because it was the first testimony taken in the case; because it was given by persons who were present; because it is reasonable and truthful upon its face; because an opportunity to impeach it and specifically deny every assertion made in it was given, and the opportunity entirely neglected. As it is the testimony of two who corroborate each other definitely and specifically, it is entitled to be accepted as the only correct narrative of the event. Pe-

Peterson, the second mate, stated (p. 111) that the accident happened in the afternoone, and then admitted the allegation of the libel that particularized it (p. 6), as having occurred between three and four o'clock. He further testified (p. 111):

"Q. At the time he was injured was the ship taking in or discharging cargo? A. Taking in cargo.

Q. State if you know whether a stevedore was employed to store the cargo.

A. Yes, sir; a stevedore was employed.

Q. Where was the man when he was injured?

A. He was down in the lower hold forward under the fore hatch.

Q. At the time he was injured where were you?

A. I was up alongside the hatch coaming on the main deck.

Q. The forward hatch coaming?

A. Yes, sir; on the port side.

Q. On the main deck? A. Yes, sir.

Q. Where is that hatch situated, that is, the part of it that goes through the main deck?

A. In forward of the foremast.

Q. State whether it was or was not under the topgallant forecastle.

A. Underneath the topgallant forecastle.

Q. Then there was a hatchway through the topgallant forecastle directly above it? A. Yes, sir.

Q. Who was standing there with you, if any one, alongside the hatch?

A. There was no one just alongside of me, but there was one of the stevedore's men came along.

Q. Never mind the stevedore's men. I mean of the ship's company.

A. The third mate was a little way from me. He was not alongside of me. He was a little ways of me.

Q. Outside of or underneath the topgallant forecastle?

A. Underneath the topgallant forecastle.

Q. Did you see the way in which the accident happened? A. Yes, sir.

Q. Go on; state how it happened.

A. There was a little keg standing on one corner of the hatch cover, on the port corner of the hatch cover, and one of the men happened to touch the top hatch cover on the starboard side and through that it started the keg off the hatch cover, and the keg went down through the hatch, and struck the man.

Q. Who was the man that trod on this hatch cover?

A. One of the stevedore's men. Which one it was I cannot say.

Q. It was one of the stevedore's men, but you do not know his name?

A. No, sir. I did not take particular notice which one it was.

Q. Were any others of the stevedore's men underneath the topgallant forecastle except this one that trod on the hatch? A. I don't think there was.

Q. What was this stevedore's man doing when he trod upon the hatch cover?

A. I don't know exactly what he was doing. He just happened to come along and touch the hatch cover. Either he was going down in the hatch, or what he was going to do I don't know. I know he just happened to touch the hatch cover the least mite.

Q. Had this forward hatch cover been taken off that morning? A. Yes, sir.

Q. Who took it off? A. The stevedore's men.

Q. State who took the hatch covers off in the morning when they went to work. A. The stevedore's men."

He described the keg as hereinbefore quoted, and testified further (pp. 114, 115):

"Q. Then when the keg tipped over the hatchway, you were standing right alongside the hatch coaming?

A. Yes, sir.

Q. On which side of the hatch, port or starboard?

A. On the port side of the hatch coaming.

Q. What was the reason that this hatch cover tipped when the stevedore's man touched it, or stepped upon it?

A. It was not laid down as it ought to be. It was not laid down solid. If the hatch coverings were put down as they ought to be, one on top of the other, there would not be any trouble attached to it, but they just put them down any way at all as they were always in a hurry.

Q. That is, the hatch covers tipped on account of it being piled up; from the way in which they were piled up by the stevedore's men? A. Yes, sir.

Q. How many hatch covers were there? A. Three.

Q. Were they crowning at all?

A. Yes, sir; a little crown to the hatch."

On cross-examination, Peterson repeated and emphasized what he had before testified. He said (p. 117):

"Q. And you mean to tell us then that just as this keg tipped over and fell down you happened to be looking down? A. Yes, sir.

Q. Just at that moment?

A. Just at that moment, yes, sir.

Q. What were you doing under the forecastle head?

A. I don't exactly recollect what I was doing. I had underneath there two boys, and the third mate, finishing something I was doing. I cannot recollect now what I was doing. There is always something.

Q. How far was this work from the forward hatch?

A. I should judge about ten or twelve feet from the hatch.

Mr. Andros.—Q. That is where you had been at work?

A. Yes, sir."

The witness gave his deposition on the 17th day of October, 1892, and it is not strange that he could not remember and describe in detail, the probably not very important work that he had been engaged in immediately before an accident that had happened six months previous. Certainty of memory and narration would have tended to discredit him, for it would have been unnatural, and have aroused suspicion that the story had been in part invented, with particulars to fit. It was such particularity that we claim has brought discredit upon the testimony of libelant's witnesses.

As to the solidity with which the coverings lie, when properly laid, he testified, (p. 118):

"Mr. Holmes.—Q. How much of a crown is there to them? A. Not much, just a little.

Q. Hardly perceptible to the eye?

A. Yes, sir; you can see it.

Q. Is it not a fact that when these three hatch covers of the forward hatch are piled one on the other, the lower one being flat on the deck, that they stand solid?

A. They stand pretty solid, yes, sir. One of them is laid on the other.

Q. Don't they stand absolutely solid?

A. They stand solid enough, so that they would not do any damage.

Mr. Andros.—Q. That is when they are piled down as they ought to be?

A. Yes, sir; when they are piled down as they ought to be. There is a ring bolt in each corner of the hatch to lift them with, and when those hatches are not laid down properly they will wobble."

This witness thus invited the libelant to show that the covers had a high crown, were unevenly made, could not be made to fit, never did fit, always wobbled and would upset anything that was laid on them, and were generally defective in this particular; yet the libelant offered no testimony that casts the slightest suspicion upon the truth of all that he had said of the solid condition in

which the covers usually were when properly laid. The witness, even unasked, unnecessarily but voluntarily, as if in response to a natural and truthful impulse, disclosed the fact that there was "a ring bolt in each corner of the hatch to lift them with," and again invited testimony to prove that the covers never were, and never could be, piled solid. The invitation to discredit what he said was not accepted. He had testified with perfect confidence in the truth of his testimony, and all that he said stands uncontradicted.

Peterson testified further (p. 119), as before quoted, that he had cautioned the foreman of the stevedores to lay them down as they ought to be, and Mr. O'Donnell, the foreman, accepted his testimony in silence. He testified further (p. 120):

"Q. Who do you say was with you there at the forward hatch?

A. The third mate was underneath the forecastle too —the third officer, and there was a couple of the boys underneath the forecastle too, but they were in the forward part—away forward."

Knowing that these two boys had left the vessel several days before, and were utterly lost to aid his testimony, if he had had any idea of concealing any fact or any evidence of a fact, he would not have spoken of the two boys. The fact of their existence came from him, and the fact of their absence and his honesty has apparently been made the basis of distrust in him.

The testimony of Henry Hannum, the third mate, who, as the second mate has just testified, was underneath the forecastle at the time, corroborated in every important particular that of the second mate. He testified, on direct examination (pp. 127 et seq.):

"Q. While the ship was in Philadelphia do you know of one of the stevedore's men being injured in the lower hold of the vessel? A. Yes, sir.

Q. At the time he was injured where were you—what part of the ship?

A. Standing under the topgallant forecastle.

Q. How near to the forward hatch?

A. I was about three feet away. When he was hit I was looking right over the hatch.

Q. Where was the second mate at that time?

A. Under the topgallant forecastle, near the forehatch.

Q. How near to the hatch? Close by or away from it?

A. Pretty close.

Q. Where was this man that was hurt at work?

A. He was about even with the beams in the lower between deck.

Q. Working in the lower hold? A. Yes, sir.

Q. How high in the lower between deck had the cargo been stowed? Under the square of the fore hatch?

A. I think about five feet under the lower between deck; five or six feet.

Q. What hit him, if you know?

A. It was a keg.

Q. What sort of a keg was it?

A. It was a pickle keg. I think it was one of these small pickle kegs.

Q. State whether that keg fell down through the hatch into the lower hold. A. Yes, sir.

Q. Where was the keg before it fell?

A. It was setting on the fore hatch under the forecastle head.

Q. How happened it to fall down in the lower hold, if you know?

A. One of the men trod on the hatch, and the hatch tilted and the keg rolled off, and fell down.

Q. What man was it—one of the crew of the ship or one of the stevedore's men?

A. One of the stevedore's men.

Q. Do you know who took off the fore hatch covering on that morning under the topgallant forecastle?

A. The stevedores.

Q. Where were these hatch covers piled?

A. Piled in the forepart of the hatch.

Q. Forward of the coamings? A. Yes, sir.

Q. Forward of the forward coamings?

A. Yes, sir.

Q. When the keg tilted and fell over the coamings of the hatch did the second mate say anything?

A. Yes, sir.

Q. What did he say?

A. He sang out, 'stand from under.'

Q. Did you see the keg when it started?

A. Yes, sir, I see it, but I was too far away to get to it before it fell over the hatch.

Q. Had it hit the man before you looked down the hatch?

A. Yes, sir; just as I got there to the hatch I saw the keg fall.

Q. Who was under the topgallant forecastle besides you and the second mate and this man who trod on the hatch? Any of the boys or the ship's company?

A. Yes, sir; I think one of the boys was under there.

Q. How many belonging to the ship were on board of her at this time? Yourself, and second mate, and who else? A. Two boys.

Q. Was her crew then shipped at this time?

A. No, sir. They had all left.

Q. The only person that belonged to the ship was yourself, the second mate, and these two boys at that time?

A. There was a steward and carpenter, and the port captain.

Q. Where was the master of her at that time?

A. He was at home.

Q. Do you mean in Philadelphia?

Q. No, sir, at Thomaston, Maine.

Q. Where was the first officer?

A. He was home down at Thomaston.

Q. Do you know what this stevedore's man that trod on the hatch was doing, where he came from, or where he was going?

A. I think he came out of the watercloset.

Q. He was crossing over the deck from one side to the other. Do you know which side he came from and which way he was going?

A. He came from the starboard side.

Q. Which side of the ship lay to the dock?

A. The port side."

This testimony of the third mate, in corroboration of that of the second mate, proves that the man who trod on the hatch covering was a stevedore. These two, and Fitzgerald, are the only witnesses who claim to have seen the person who trod on the cover. It is claimed on behalf of libelant that it was one of the crew, because, as the Court below states in its opinion (p. 161), (1) "everyone connected with the stevedore's gang on that day was called by the libelant, and not one of them stated that he was the person who trod on the hatch cover." To this argument it may be replied, (1) that only one of them was asked if he was the person, and he was the only person who denied that he threw the barrel down or trod on the coverings (p. 103); that was King, who testified on page 102, as follows:

"Q. State where you were on the ship at the time.

A. I was in the between decks. I was carrying wood forward. That was dunnage. As I came back for another armload, I happened to see a cask come down the hold and I hallooed. It hit Jensen on the head and threw him to the floor.

Q. Were you on the same deck that Mr. O'Donnell the foreman, was on? A. Yes, sir."

And on cross-examination he testified (p. 104) thus:

"Q. You were on the between decks?

A. Yes, sir. I was rolling a barrel of oil out of the way to make a gangway for me to walk in and get the dunnage away.

Q. This barrel came from above? A. Yes, sir.

Q. Therefore it must have come from the main deck?

A. It came from the main deck and struck this gentleman on the head."

This remarkable witness thus stated on page 102, that at the time of the accident he was "carrying wood forward," and was coming back for another armload; also, on page 104, that he "was rolling a barrel of oil out of the way." He thus endeavored to clear himself from being suspected of being the guilty person. His testimony is important chiefly as showing that his testimony too, is mostly untrue.

Another reason that existed in the mind of the Court for thinking it was not a stevedore was—we quote from the opinion of the Court, page 161—that "each one of them related where he was working at the time of the accident, and not one of them was on the main deck except the burton-tender (Jno. F. Davidson), and he testified that he was at the main hatch, not the fore hatch, some fifty feet away, thereby precluding any inference that it might

have been one of the stevedores who stepped on the hatch covers."

But only fourteen stevedores have testified, and according to their own admissions, there were several more. O'Donnell said (p. 49), that there were in the lower hold, "to the best of his knowledge, twelve men"; King said (pp. 104, 105), that he was between decks, and that "on my side there were three men and the foreman," and "on the other side, to my knowledge, there were two men." That would make (12 plus 5) seventeen men, besides Davidson, the hatch-tender O'Donnell (p. 55) on the main deck, and Goble (p. 74) the engineer on the wharf. That would make nineteen stevedores, five of whom have not testified.

Moreover, it not only does not seem impossible, but it is altogether probable, that Davidson was the man who trod on the cover. He was the burton-tender. His position of duty then was at the fore hatch, the only one through which the cargo was being stowed.

O'Donnell testified directly (p. 48) that at that time "the hatch-tender was on the forecastle deck, of course," for he supposed that he was at his post of duty, and testified so, simply because he supposed so. That fortifies our belief that he, as well as others, was careless in testifying. That statement he repeats on redirect examination (p. 55):

"Q. Where was the hatch-tender?

A. He was on the forecastle deck."

But O'Donnell was between decks, and it was impossible for him to swear to the position of Davidson. But Davidson not being altogether intelligently forewarned, was not intelligently forearmed. He inadvertently confessed that he was not where O'Donnell swore he was. He was not on the forecastle deck. He testified (pp. 68, 69), and we quote his entire testimony:

"By Mr. PRICHARD.—Q. What is your business?

A. Burton-tender.

Q. Were you on the ship 'Joseph B. Thomas' in April 1892, when Mr. Jensen was injured? A. Yes, sir.

Q. What part of the ship were you in at the time?

A I was at the main hatch, splicing the hook in.

Q. In what part?

A. On the upper deck. We had a stage built over the top of the hatch. I was splicing it in, and I heard a halloo, and I went forward, and there was a couple of men had this stage slung in between decks. Mr. Nielson was one and Mr. O'Donnell helped him.

Q. That is, they were carrying Mr. Jensen out?

A. Yes, sir; I hallooed to the engineer to go ahead.

Q. You did not see the accident? A. No, sir.

Q. You did not see the barrel?

A. No, sir; if I had seen it there I *would have taken it away*

away.

Q. Do you know who took the hatch coverings off that morning?

A. I don't know; I didn't see anybody lift them.

Cross-Examination.

By Mr. EDMUNDS.—Q. You were at the main hatch?

A. Yes, sir.

Q. That would be quite a distance in the ship from the fore hatch?

A. I couldn't tell you exactly how far.

Q. Nearly fifty feet, wouldn't it?

A. I *couldn't tell you* that exactly."

He thus admitted that he was not where he should have been, and swore he was "at the main hatch splicing the hook in." That located him, certainly, on the main deck where the coverings were. He said: "We had a stage built over the top of the hatch." This manifestly means, a stage built over the main hatch. But in the next sentence he said: "a couple of men had *this stage* slung in between decks." He also said: "I was splicing it in, and I heard a halloo and went forward." This, however, is vague, and confuses the time of the accident with what was evidently later, when he was needed to attend the burton, at the time "they were carrying Jensen out." But he was on the main deck before that time, both just before and when the accident happened.

King, a stevedore, confirms us in this belief. He testified (pp. 107, 108)):

"Q. You were loading with steam power?

A. Yes, sir.

Q. Did you have a burton-tender on deck?

A. Yes, sir.

Q. Was he on the main deck? A. Yes, sir.

Q. Right at the hatchway?

A. Yes, sir; right at the hatchway [of course, the fore hatchway].

Q. Did it take more than one man for that?

A. No, sir. Just one man. He has a whistle and gives the signal when to go ahead and when to come back.

Q. But you had to have somebody to stop the swing. Was he on the wharf?

A. There was an engineer on the wharf.

Q. He cannot stop the swing—somebody must do that on deck?

A. The burton-tender on deck generally has a rope made fast to a ring bolt, and throws it around the fall and steadies it that way himself.

Q. That is what he was doing that day, was it?

A. Yes, sir.

Q. Do you remember upon what side of the hatchway he was standing? A. Yes, sir; the port side."

As Davidson then was on the main deck at and after the time of the accident, and as both of the mates swear that the man who trod on the covering was a stevedore coming from the watercloset, and Fitzgerald testified it was a full grown man, not a boy, the conclusion that it was Davidson seems to be irresistible. The occasion of his passage across the deck was a natural and probable one. He was undoubtedly returning to it when he trod on the cover-

ings and upset the keg. If he did it, he did subsequently what was natural for the ordinary man. He was afraid that some one had been hurt by the keg, and he hastened on aft, and when they "hallooed," as he said, for the burton-tender to come to his post, when they were carrying Jensen out, he had to come from the place of his retreat, possibly near the main hatch, fifty feet away. He afterwards excused himself for being there by saying he "was splicing the hook in." Entire honesty and good faith would have furnished further testimony of the necessity for his absence from the fore hatch, and for his presence at the main hatch where no one else was working, of what hook he was splicing in, and for what purpose. The truth is, he had no business at the main hatch then, for there was no stowing there and no need of a hook. Without any explanation, but only the bare facts established by the testimony of himself and the two mates, there is left no other conclusion than that Davidson was the man. The testimony of both of the mates had been taken several months before that of Davidson, while that of Davidson, if taken on the same day with that of Fitzgerald, was nevertheless taken subsequent thereto, the conclusion as to the person who trod on the coverings pointed directly to him. Yet he was not asked by libelant's counsel, how long he had been at the main hatch where he was hallooed to, nor if it was he who was coming from the water-closet just before the accident, nor if it was he who trod on the coverings.

It is no way probable that if asked by the claimant's counsel he would have made confession of any such controlling facts, but the burden was on libelant not only to prove specifically his charges, but to free from suspicion one of his own witnesses who had become involved by the testimony of the mates, Fitzgerald, King, and the witness (Davidson) himself. The silence of that witness, where explanations were demanded from him, whether dictated by the discretion of libelant's counsel or by his own fear of detection, is an unanswerable argument in favor of claimants, and, we claim, decides the query touching the person who upset the keg into the hold.

We now draw the attention of this Court to the fact that after the depositions of witnesses of libelant had been taken, and claimant's counsel were informed of the web which was evidently intended to be woven from the inconsistent, unintelligent, careless, or mistaken, but, in most cases, palpably untrue statements made by the stevedores, said counsel, at their earliest opportunity, to-wit, on the 9th day of November, 1893 (p. 135), recalled Hannum, to contradict the improbable, untrue, and scarcely cunningly devised story told by the two persons unconnected with the ship, Fitzgerald and Gray, and of whose presence and errand, and demand for a piece of rope on the vessel, not one of the stevedores—witnesses of the libelant—gave any confirmation, or any sign of knowledge whatever. Said counsel called also, at the same time, the master of the vessel and the carpenter, to

add such negative testimony as would free the claimants from any suspicion of disinclination to meet the issue, or to reveal to the Court every fact within the limits of possibility.

In the second deposition of Henry B. Hannum, the third mate, he testified directly and unequivocally (pp. 136 et seq.) as follows:

"Q. In October, 1892, you were examined as a witness on behalf of the claimants in this case; since that time have you been to sea? A. Yes, sir.

Q. When did you last sail from this port?

A. About the midde of October, 1892.

Q. When did you return back to this port?

A. The 17th of September of this year.

Q. Are you still connected with the ship 'J. B. Thomas' as one of the company of that ship? A. Yes, sir.

Q. In what capacity? A. Third mate.

Q. When you testified in this case in October, 1892, you stated that at the time that Jensen was injured you and the second mate, and one of the ship's boys, and one of the stevedore's men, were under the topgallant forecastle; now, at that time were there any other persons under that topgallant forecastle except those that you mentioned at that time? A. No, sir.

Q. Just at and immediately before the time that the cask fell into the hold, by which Jensen was injured, had the second mate come up from the between decks?

A. No, sir.

Q. If just at the time that the cask fell into the hold, by which Jensen was injured, the second mate came up from the between decks through the fore hatch, could you have seen him? A. Yes, sir.

Q. If any stranger from the shore had come in on the main deck under the topgallant forecastle, and had asked the second mate to give him a piece of rope, in your opinion, would you have heard him? A. Yes, sir.

Q. Did any person from the shore come on board the ship just before the accident happened, under the topgallant forecastle, and request the second mate, or any other person there, to give him a piece of rope?

A. No, I didn't see anybody, and there was nobody there.

Q. Did any person belonging to the ship, as one of the company of the ship, tread on the hatch covers, by reason of which the cask by which Jensen was injured was precipitated into the hold? A. No, sir.

Q. What means are there of getting from the between deck on to the main deck under the topgallant forecastle?

A. There are no means when the hatches are off. When the hatches in the lower between decks are off there are no means of getting up.

Q. I am not speaking of lower between decks, but of first between decks; now, suppose you had at the time this accident happened been in the between decks and wanted to come upon deck, how would you come up, through what hatch? A. Through the main hatch.

Q. What were the means of getting on the main deck from the between decks through the main hatch?

A. You come up a ladder.

Q. At the fore hatch under the topgallant forecastle, what means were there of getting from the between decks on to the main deck?

A. There are steps there when the hatches are on between decks.

Q. What means are there of getting from the between decks on to the main deck through the forward hatch when that hatch is open?

A. There are two hatches, and a hatch on the main deck. There is no way of getting up unless the hatch in the between decks is on.

Q. When the forward hatches in the between decks are on, what means is there of getting from the between decks on to the main deck through the forward hatch on to the topgallant forecastle?

A. There is steps put there.

Q. At the time that this accident happened were the between decks forward hatches open or closed?

A. Open.

Q. And being open, what means were there of getting from the between decks on to the main deck through the forward hatch on to the topgallant forecastle?

A. There is no way of getting there.

Q. Do you know about what the distance is from the upper between deck to the main deck?

A. About nine feet.

Q. Then if they were working the forward hatch down into the lower between decks, and a person in the between decks wanted to come on the main deck, he would have to come up through the main hatch? A. Yes.

. . . . . .

Q. A witness by the name of John F. Fitzgerald has testified in this case as follows: That at the time of the accident 'the mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up—the stevedore—to get on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he trod on that hatch.' Is that true? A. No, sir.

Q. He also testifies the man who trod on the hatch was a man belonging to the ship; is that true? A. No, sir.

Q. At this time was there any mate on board the ship except the second mate, and yourself as third mate?

A. No, sir.

Q. The first mate was not aboard? A. No, sir.

Cross-Examination.

Mr. Holmes.—Q. If the witness Fitzgerald, in his testimony just quoted to you, had said 'second mate' instead of 'mate,' then that testimony would be true, would it not? A. No, sir.

Q. Were you working in loading the 'J. B. Thomas' through the main hatch at the time mentioned?

A. No, sir, not through the main hatch.

Q. Don't you sometimes load through both hatches at the same time?

Mr. Andros.—Objected to as immaterial as to what they sometimes do.

A. Yes, sir.

Q. How is it that you can now recall that you were not on the day mentioned loading through the main hatch, as well as through the forward hatch?

A. We had only one gang of stevedores.

Q. How many stevedores are there in a gang?

A. I don't know.

Q. Then how do you know there was only one gang of stevedores? A. They were only working one hatch."

On redirect examination (p. 147) he testified:

"Mr. Andros.—Q. When the stevedores went below to work cargo, through what hatch did they go, through the main hatch or forward hatch, or the after hatch?

A. Through the main hatch.

Q. When they got through work, or whenever they wanted to come on to the main deck, through what hatch did they come on to the main deck, whether the main hatch or the forward hatch?

A. Through the main hatch.

Q. At the time this accident happened were they loading cargo through the forward hatch? A. Yes, sir."

This second deposition of the third mate, whose previous testimony has not in any single statement been disputed, is sufficient, in corroborating the testimony of Peterson, to annul any effect of the testimony of Fitzgerald or of Gray. We ask this Court to notice that the third mate has stated (p. 226) that "the stevedores went below to work cargo, through the main hatch"; that "when they got through work, or whenever they wanted to come to the main deck, they came through the main hatch," because, as he had previously stated (p. 223), the means of egress from between decks was through the main hatch by "a ladder." This strengthens our contention that, when the mates were aboard ship, apparently only as ship-keepers, while the principal work to be done was stowing by the stevedores, and the ship had no crew, it is incredible that the second mate, in his leisure, should forego the easy ascent by the ladder, where he needed no assistance, but should rather undertake to climb a stanchion, where he would require the assistance of O'Donnell from below and of some chance person on deck, while he would run the risk of losing his hold and falling, at least twenty feet. This testimony thus sustains us in the contention that the second mate did not climb up the stanchion, and was not helped up from between decks, as told by libelant's witnesses. It aids us in showing, by direct, uncontradicted testimony, that neither Fitzgerald nor Gray were on board the vessel at the time of the accident, or at least were not where they claimed to have been.

The testimony of the carpenter, Ole Larsen (p. 147), is only to show that, though on the ship, he did not see the accident. The testimony of Captain Lermond (p. 148), confirms the earlier testimony of the third mate, that the two boys on the ship had been discharged immediately after the arrival of the ship in San Francisco, several days before the libel was filed, and had not been seen since. This is all the testimony offered by claimants, and we contend that it is sufficient fo rtheir defense. But in the opinion of the District Court, its effect is greatly weakened, and that of libelant strengthened, by reason of an omission to produce the two boys, part of the ship's small company. Indeed, a principal, and apparently the controlling, reason which moved the Court below to accept a version of the event given by witnesses of libelant and for distrusting the testimony on behalf of claimants respecting the person by whise act it was that the keg was precipitated into the hold of the ship, is expressed in the opinion on pages 161 and 162; and on page 167 the Court repeats:

"The failure to call these two young men not only leaves us without their testimony on this point, but, under the rule of evidence heretofore referred to, raises a presumption against the claimants that their testimony, if produced, would have been unfavorable."

The principle of law invoked by the Court on which this presumption is based, is, beyond controversy, correct, but with all proper deference to the views of the learned

Judge, we think that a more careful examination of the testimony will disclose the fact that when the opportunity arose to take testimony on behalf of the claimants, these young men were beyond the reach of the claimants and of the process of the Court.

The ship arrived at San Francisco on the 19th day of September, 1892. The libel was not filed until the 10th day of October following, twenty-one days after the ship arrived. The crew were paid off on the 22d, 23d, or 24th of September, three, four or five days after the ship arrived, and they left the ship the day after they were paid off, sixteen, seventeen or eighteen days before the libel was filed.

Peterson, the second officer of the ship, whose deposition was taken on behalf of the claimants on the 17th of October, 1892, on page 111, testified:

"Q. What time did you arrive in San Francisco?

A. We arrived here September 19, 1892, on a Sunday night."

Hannum, the third officer of the ship, testified on his redirect examination (p. 134):

"Mr. Andros.—Q. Are those boys that were under the topgallant forecastle at the time this accident happened on board the ship yet? A. No, sir.

Q. When did they leave? How long ago?

A. The day after we were paid off. The 23d or 24th of last month.

Q. September? A. Yes, sir.

. . . . . .

Q. Besides yourself, the second officer, and the carpenter, who else is on board?

A. Aboard the ship now is the steward, the cook, the captain, first, second, and third mate, and the carpenter, and the painter.

. . . . . .

Mr. Holmes.—Q. These two boys that you have spoken of are still in the city, so far as you know?

A. No, sir, I don't know anything about them.

Q. So far as you know they are?

A. So far as I know.

Mr. Andros.—That is, you don't know where they are?

A. No, sir, I don't know. No one told me anything about them, and I have not seen them.

Mr. Holmes.—You don't know that they have left the city?

A. No, sir, I don't know anything about them since they left."

Captain Lermond testified that he was master of the ship "J. B. Thomas" on her voyage from Philadelphia to San Francisco in 1892.

"Q. Were you on board of her when a man by the name of Jensen, a stevedore, was injured on board of her?

A. No, sir.

Q. Did you have two boys on board of her who came to San Francisco? A. Yes, sir.

Q. How long after you arrived in San Francisco was it that those boys left the ship, if they did leave her?

A. Three or four days, I think.

Q. Did they ever return to the ship and rejoin her?

A. No, sir.

. . . . . .

Q. Do you know the names of those two boys?

A. On the articles they were Ete Watten and Victor Russ.

Q. Do you know whether Ete Watten ever went by the name of Hans Watten?

A. Yes, he did on board the ship. That was the name he went by altogether on the ship.

Cross-Examination.

Mr. Holmes.—Q. Did these two boys leave when they were paid off?

A. No, sir, a day of two after. They were paid off on the 22d, I think, of September, and they stopped two or three days after that on board the ship.

Q. And they were paid off how many days after the ship arrived?

A. The third day, I think; I am not certain.

Q. Were they paid off at the same time the rest of your crew were paid off? A. Yes, sir.

Q. At the shipping commissioner's office?

A. Yes, sir.

Q. Did you occasionally see those two boys, or either of them, after they left the ship?

A. I think I saw one of them along the side of the ship once; I am not sure; I think I saw him alongside of the ship once, this Hans.

Q. Any more than once? A. No, sir, I think not.

Q. Did you ever see the other one?

A. No, sir, never."

In November, 1893, the ship was again in San Francisco, and the witness Hannum was again called by the claimants for the purpose of rebutting some parts of the testimony taken on behalf of the libelant. In the course of his examination he testified.

"Q. Do you remember the names of these two boys who were on board the ship at the time this accident happened? I mean the two ship's boys.

A. I remember one of them.

Q. What was his name? A. Victor Russ.

Q. How long, or about how long, after the ship arrived here in 1892 was it before these two boys left the ship, if they did leave it?

A. I believe it was about a week.

Q. Do you know what became of them, if they went to sea or not, of your own knowledge?

A. No, sir." (Record, p. 139.)

From the foregoing testimony it is evident that the two boys were, as well as the rest of the crew, paid off in San Francisco, and left the ship at least two weeks before the libel was filed, and that neither the master nor the third officer ever saw them again or knew whither they went.

The claimants could only ascertain from the officers of the ship if these two members of the crew were still connected with her, and, if not, whether they had any knowledge of where they were; there was no one else, so far as appears, to whom they could apply for information. After a sailor has been paid off and left a ship, it is quite as impossible to locate him as it would be to locate a bird of passage after it has entered upon its spring or autumn flight.

Now, the claimants were not called upon to take any testimony until a suit was pending wherein testimony could be taken. Whether or not an action would be commenced by the libelant, or, if to be commenced, what would be the alleged facts on which it was to be founded, they were, of course, ignorant. There was nothing to which they could respond, either by pleadings or facts. Up to the time, then, of the filing of the libel, they could not be guilty of laches in not taking the testimony of these two boys, and when it became necessary to take defensive testimony, clearly these had got beyond their reach. Under these circumstances no presumption should be indulged in against the claimants, that the testimony of these persons, if taken, would have been adverse to their contention.

In the natural course of events, we submit, there is scarcely a presumption that the boys, if present to testify, would have testified adversely to the claimants. Our confidence in the truth of the narration by the mates has

made the unavoidable deprivation of the testimony of the boys a source of regret, for we believe their testimony would have fully sustained the mates.

From this plain narrative by the second and third mates of the events which culminated in the accident, we submit that there can be no other conclusion than that, if the accident was occasioned by the manner in which the covers were laid, then it was occasioned by the stevedores who were in charge of the hatch and its vicinity, including space enough of the deck on which to pile the covers; that they piled the covers, and if the keg remained there most of the day, it was with their knowledge and permission; that there was no duty on the part of the owners to oversee the work of the stevedores, nor any duty in them to exercise a care for the protection of the stevedores—the only ones who might need protection—which they were too careless to exercise themselves; that after the stevedores had piled the covers, not one of them could tell whether they were properly piled, and, if they were insecurely piled, they gave no warning of their insecurity; that therefore, leaving a keg on the further end of the covers, was in no way an act of negligence, under the circumstances developed by the testimony herein.

VII.

THE LAW APPLICABLE TO THE CASE.

Respectfully differing, as we do, from the learned Judge of the District Court, both as to his conclusions from the facts and the law applicable to them, we beg

leave to first call the attention of this Court to our view of the law, and to the cases which appear to sustain that view, before referring specifically to the principles relied on and to the cases cited in the opinion.

The Court will remember that this is an attempt to throw the responsibility, not on the person who committed the act, which directly caused the injury, but on the owners of the vessel on board of which the injury was received. The law in such case demands proof that the owners "violated some duty," and were the cause of the injury. We submit that this proof has not been offered.

"In an action for injuries caused by falling down the stairs of defendant's elevated railroad station, plaintiff's evidence merely showed that her fall was caused by catching her foot on one of the steps, and that afterward, the rubber covering on one of the steps was discovered to be loose; but no one saw her trip on the loose cover, and there was no evidence as to its condition before the accident. Held, that the complaint was properly dismissed for want of proof of negligence."

Millie v. Manhattan Ry. Co., 31 N. Y. Supp. 801.

If there was any insecurity, it was caused by the stevedores, and the result was primarily caused by them. If the insecurity arose from the carelessness of the stevedores, the insecurity was latent, and was the greater negligence of the stevedores. The stevedores having practically entire management of the part of the ship where they were at work, it was not the duty of the ship to follow the stevedores to see if they laid the covers se-

curely for their own protection, or if they laid them so carelessly as to set a trap for one of their number.

So far as danger to the stevedores themselves from their own acts was concerned, it was not the duty of the ship to see to it that the covers were made secure, or to make good the fault of the stevedores, or to secure the stevedores themselves against the improbable result of their own action.

The ship was being laden by a stevedore, under contract, as alleged in the libel, and the person injured was one of his gang (p. 6), not belonging to the ship.

We claim that the rule applicable here is that which is laid down in Shearman & Redfield on Negligence, section 79, that "a contractor is not the agent or servant of his employer in relation to anything but the specific results which he undertakes to produce," and "it follows that his employer is not responsible to third persons for his negligence, or for the negligence of his servants, agents, or subcontractors, in the execution of the work."

See cases cited under section 79.

"Where the negligence was not that of the master, but of an independent contractor, or of the stevedore having charge of the loading of the ship, the latter, and not the owners, is liable."

Bonnet v. Truebody, 66 Cal. 509.

Dwyer's Admx. v. National S. S. Co., 4 Fed. Rep. 493.

The Victoria, 13 Fed. Rep. 43.

The case of Walsh v. The Ship Babcock, 12 Sawyer, 412, is to the same effect. In that case "an employee of the master stevedore, who was loading a vessel under contract, was injured by stepping into a small trimming hatch, in the between decks, while engaged in stowing a cargo. The light in the between decks was dim, and libelant did not know of the existence of the hatch, or that it was uncovered. When the vessel was turned over to the master stevedore to be loaded, this trimming hatch was covered. It was subsequently uncovered by the stevedore's foreman. Held, that the vessel was not liable for the injury."

The analogy between the facts of that case and the one at bar seems complete.

We claim, then, that leaving the keg in the position disclosed by the evidence was not in itself negligence; for

A. There was no legal duty on claimants to exercise control.

1. This duty lay directly on the stevedores.

2. Whatever legal duty there was, if any, on the claimants, did not extend to unusual risks.

B. There was no failure, on the part of the ship, to exercise control necessary under the circumstances.

a. There was no probability of injurious consequences from placing the keg.

b. The position of the keg was not inherently dangerous.

c. The stevedores themselves saw the keg without anticipating danger.

d. The injurious consequences did not happen in the natural or probable course of affairs.

e. Whatever danger there was was apparent to the stevedore's employes.

This is upon the assumptions (1) that the covers had been laid properly when they would, according to the evidence of the second mate quoted above, have lain firmly, and (2) that, as the testimony shows, it was the custom of the stevedores to take off and pile up the hatch covers (O'Donnell, p. 53), and did so in this case (p. 46).

Applying the law to these facts, we submit that they fail to make a case of negligence against claimants. The elements of negligence are two in number: (1) A legal duty to exercise control; and (2) a failure to exercise the control necessary in the circumstances of the particular case. (Beven, Neg., p. 18.) No one of these elements is disclosed by the circumstances of the present case.

For the purpose of receiving and stowing her cargo, the stevedore had possession of the ship. Every part of her necessary for the proper performance of this service—her hold and the hatchways leading to it, the covers when taken off, and sufficient of the deck on which to pile them—were under the exclusive control of himself and his servants. It was, therefore, incumbent upon them to

carefully observe any object placed, no matter by whom, in dangerous proximity to the hatches or other parts of the ship where they had to work, and to remove it. There was nothing to prevent the stevedores from seeing and removing this keg from the hatch covers if they deemed it necessary or prudent.

If the keg stood in such a place as to arouse anticipation of injury to those working in the hold of the ship, the stevedore's men who saw it there were under a duty to guard against such danger. The fact is, however, we submit, that to neither stevedore's nor ship's men even the possibility of an accident was suggested by its position; but, on the contrary, they deemed its position perfectly safe. From the testimony of libelant's witnesses it would appear that every person who came on board noticed the keg. The two strangers testified in the case that they saw, when they got on board, its position on the hatch covers, so that they were able to render an astonishingly minute account of its exact location (Fitzgerald, p. 35; Gray, p. 98). This would make it probable that the persons who were working all day about the ship could not have failed to notice it. Its position suggested no danger to any one; else the stevedores who were most directly interested in keeping the hatchway clear would certainly have set it aside. Indeed, Davidson, the hatchtender, libelant's witness, swore (p. 69) that he didn't see it at all, and if he had seen it where described to be, he would have taken it away. That witness cannot be in

all respects credible, but if he is in this respect, his testimony would make it certain that it was not in close proximity to the hold where he stood all day.

The legal duty of guarding against a possible danger which, libelant charges, was due to negligence on the part of the ship, lay upon the men who had the control of the hatches while the loading of the ship proceeded. These men had allowed the object to stand in its position for hours. It is true that, if the ship's men had placed it in a dangerous position, where it did mischief, before the stevedores had a chance to become aware of the threatening danger, the case might be otherwise; but the evidence discloses a very different state of things. We must look upon the position of the keg before the accident happened, instead of criticising it after its occurrence. It will not do to say the accident happened, hence the position was dangerous, and the act of placing the keg on the hatch covers was negligence. The questio here is, could the happening of the injury be reasonably foreseen? If so, we claim it was the duty of the stevedores to anticipate and prevent it.

Not only was it their duty to exercise control over the keg, but more than this; it was not the duty of claimants to protect the contractor's men against unusual and unforeseen risks. Had the accident not happened, no one could have dreamed that the position of the keg subjected libelant or any one to any risk whatever. The fact alone that the *stevedores* left it standing where it was, shows

sufficiently that the risk was unforeseen by them; but all the other facts appearing in evidence show how unexpected and unusual this accident was which produced the injury.

Claimants have thus established the proposition that the first element of negligence, namely, the existence of a legal duty to exercise control, fails in two respects: First, because that legal duty was directly incumbent upon the stevedore and his employes. Secondly, because the legal duty with which claimants are chargeable does not extend to unusual and unforeseen risks.

Falls v. Railroad Co., 97 Cal. 114.

"The injury resulting from the defendant's negligence was out of the *ordinary sequence* of events, and, therefore, such as a person exercising proper precaution and forethought, under the circumstances, could not have anticipated or expected."

B. & I. R. R. Co. v. Sneider, 19 Ohio St. 410.

Railway Co. v. Elliott, 5 C. C. A. 347; S. C., 12 U. S. App. 381.

"The practical construction of proximate cause by the Courts is a cause from which a man of ordinary experience and sagacity could *foresee* that the result might probably ensue."

Shearman & Redfield on Negligence, sec. 10.

No testimony points out such to be a fact herein. "The general rule is, that a man is answerable for the conse-

quence of a fault which is natural and *probable*, but if his fault happen to concur with something that is *extraordinary* and unforeseen, he will not be liable."

McGrew v. Stone, 13 Penn. St. 436.

There could be nothing more extraordinary or unforeseen than the act of the stevedore who ran and threw his weight on the hatch covers so as to throw into the air and down into the hold a keg standing on them at a distance of six feet.

B. It can be shown with equal conclusiveness that libelant's case is lacking in the second element necessary to constitute actionable negligence on the part of these claimants in this respect: That there was no failure on their part to assume and exercise any control necessary under the circumstances of this case.

1. There was no probability of injurious consequences attached to the placing of the keg. In the nature of things, the position was not inherently dangerous. A small keg standing on one head, with the other out, has its center of gravity very near the bottom, and would be likely to maintain its equilibrium against any ordinary contact. It would certainly not fall over of its own motion, and it would probably not yield to an ordinary disturbance. It would, of course, be impossible to determine the probability of its falling over with any degree of scientific accuracy; but it can be reasonably maintained that in the ordinary course of events, the probability of

its remaining in an upright position, was greater than the probability of its falling over. In other words, it was improbable that the keg should fall; ordinary care and prudence could not foresee that this probability would be overcome by the advent of an extraordinary cause. But more than that; if we assume that the covers were properly laid, and, therefore, formed a reasonably solid basis for the keg, it would, in all probability, not have been pitched into the hatch, if some ordinary cause had upset it. It stood away from the coamings; the plane upon which it stood was several inches lower than the upper edge of the coaming. Had the keg been simply tipped over, it would, in all probability, have remained on the covers without falling down the hatchway. It therefore becomes apparent that, first, probably the keg would not fall over; second, even if it should fall, that it would not fall down the hatch. In other words, its position was not *inherently* dangerous, so as to charge these claimants with negligence in placing or leaving it there.

But the fact that no one, neither ship's employes nor stevedores, foresaw any danger from its position, appears clearly in evidence. The object stood there for hours, while the regular work of loading was going on. One of the stevedores testified that he saw it there. We have shown that the burton-tender, whose position, while the work was in progress, was on the forecastle a few feet above the keg, said he saw it there. The other stevedore's men, when they came on deck at lunch time, if at no other

time, must have seen it there. The work of loading went on through the day; the burton-tender, whose duty it is to steady the swing of the loads did not anticipate that one of the loads might swing out of the coamings and precipitate the keg into the hold. As a matter of fact, the ordinary course of business did not bring about the accident and injury. Now, does not the fact that some of these men saw the keg without removing it, raise the strong inference that an ordinary man would not, and could not, have foreseen that an injury might be the result of the position of the keg? Do not these facts prove that there was no failure, on the part of the claimants, in the exercise of their control over the keg necessary under the circumstances?

There was, then, no probability of danger suggested by the position of the keg. It is not claimed that there was not some possible danger. People working underneath a hatch or shaft are necessarily exposed to the possibility of danger. If there was any danger, it was obvious to every person concerned. The stevedores knew of the surroundings in which they worked. If there had been any hidden danger, any trap, there would have been a strong duty incumbent upon the ship to take great precautions. But the dangers liable to arise from moving about under an open hatch are palpable, visible and notorious, and hence it was, under the circumstances, the duty of the stevedores who had charge of the hatch to take such precautions as were reasonable to prevent mischief.

B. 2. The fact that a keg belonging to the ship fell from her deck into the hold and injured the libelant is not, under the proofs, sufficient to raise a presumption of negligence on the part of the claimants or their servants.

The principle that the mere happening of an accident raises a presumption of negligence, is perhaps nowhere better stated than in Transportation Co. v. Downing, already cited, and in Scott v. London Dock Co., 3 H. & C. 596, cited by the Court in Transportation Co. v. Downing.

In Scott v. London Dock Co., Erle, C. J. said: "There must be reasonable evidence of negligence. . . . . But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

From this statement of the law it appears that two conditions must be satisfied, in order that the mere occurrence of an injury be sufficient to raise a presumption of negligence:

1. The injurious agency must be under the management of the defendant.

2. The accident must be such as, in the ordinary course of things, does not happen, if those who have the management use proper care.

It is submitted that neither of these two conditions is satisfied in the present case.

As to the first requisite, the evidence in the present case discloses the fact that the object which produced the injury was not under the management of claimants in the sense in which the word "management" is used in the cases cited above, and in the other cases supporting the doctrine of *res ipsa loquitur*. In these cases, "management" means immediate and active management or control of the thing by the defendant at the time it caused the injury.

The maxim *res ipsa loquitur* does not apply in this case. There is no need to resort to presumption. The facts are all in proof as to how the accident happened. An "explanation" has been given. It was occasioned by the falling of a keg placed upon some of the hatch covers, and precipitated into the hold by some one stepping on these covers. As to these facts, then, there is no need of resorting to presumptions. The fact that the evidence as to who stepped on these hatch covers—whether a servant of the independent contractor or a servant of the claimants—is conflicting, does not raise a presumption that it fell through the negligence of the claimants. Whether it was negligently placed on the hatch covers is not a matter of presumption, for it is in proof as to how it was placed and by whom. It is not a matter of presumption what caused it to fall, because it is in proof that someone stepped on the hatch covers; as to who it was that stepped on them there is a conflict of testimony. This is to be resolved not by a presumption that the claimants were negligent, but by presumptions growing out of the evi-

dence as to who it was that did the proximate act of stepping on these covers that precipitated the keg into the hold of the ship.

3. If the placing of the keg on the hatch covers be negligence, claimants are not liable for the injury.

We have already submitted that the mere act of placing the keg in the position disclosed by the evidence cannot be construed into an act of negligence *per se;* but assuming that this act indicated carelessness on the part of the servants of the claimants and that injury to the libelant grew ultimately out of it, still these facts are not sufficient to fix the responsibility for the injury upon the claimants. It must be shown that the act of the claimants was the proximate cause of his injury.

In the case of Sheridan v. Bigelow, 67 N. W. 732, 193 Wis. 426, Marshall, J., after stating the facts of the case, says: "The verdict is fatally defective for want of any finding on the subject of proximate cause. It finds specially that defendant did not exercise ordinary care in the operation of its train, and in keeping its track free from obstructions; that plaintiff was injured, and was not guilty of any want of ordinary care, which contributed to produce such injury. But that is not sufficient to cast upon defendant the consequences of such injury. It should not be forgotten, in such cases, that the mere fact that one person is injured by the failure to exercise ordinary care on the part of another, in respect to some duty which such other owes to such person, does not render

such other liable therefor, unless such injury was the natural and probable result of such negligence, and one which, in the light of attending circumstances, such other ought reasonably to have foreseen might probably occur as a result of such negligence. This is absolutely an essential element of proximate cause requisite to actionable negligence. . . . . As said in McGowan v. Railway Co., 64 N. W. 891, in effect, the facts constituting proximate cause, i. e., not only that the injury was the result of want of ordinary care on the part of the defendant, but that, in the light of attending circumstances, a person of ordinary intelligence might have expected that such an injury might probably occur as a result of his failure to exercise ordinary care, are indispensable in order to constitute a continuous succession of facts so connected as to make a complete chain, a natural whole, reaching from the negligent act down to the injury, and producing it, so as to show that such negligence and the injury stand in the relation of cause and effect, so as to establish defendant's legal liability for the consequences of it."

The rule as to proximate cause is thus stated in Milwaukee & R. R. Co. v. Kellogg, 94 U. S. 469: "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some *new and independent cause* in-

tervening between the wrong and the injury? . . . . It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

In Henry v. Southern Pac. R. R. Co., 50 Cal. 183, Mc Kinstry, J., says: "A long series of judicial decisions has defined proximate or immediate and direct damages to be ordinary and natural results of the negligence, such as are usual, and therefore as might have been expected."

"The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression." (Grove, J., in Sharp v. Powell, L. R. 7 C. P. 253.)

Now, the act complained of in the present case, namely, the act of placing the keg into the position shown by the evidence, was not the proximate cause of the injury to libelant, for two reasons: First, because this act was, in itself, only a condition and not a cause, of the accident; second, because a new cause intervened between the act and the result, a cause which in this case, was the real *causa causans.*

First, the position of the keg was certainly not so closely connected with its fall through the hatch that the fall could be considered the natural and probable consequence

of the act of placing it near the hatch. If the evidence showed that the keg remained "nicely poised" near the opening, the case might be different. By placing it in the position where it was, no force was put in motion; it rested with its flat end on a flat surface, and the chances were exceedingly great that it would maintain its position. Its liability to fall down the hatch was only proved by its actually falling down. The act of putting it in the vicinity was not sufficient to bring about the injurious result. In other words, the act of placing it there had nothing to do with the accident. The latter was in no sense the proximate, necessary, or probable result of the former. The same consequence might have occurred, even if the keg had been placed upon the level of the deck. A person stumbling against or otherwise interfering with it might have so disturbed it as to have precipitated it down the hatchway, even if it had been at a greater distance from it. The mere fact of the position of the keg was not, therefore, the proximate cause of the injury, failing, as it does, in these two particulars, to show (1) that the injury was the natural and probable consequence of the alleged negligence; and (2) that it was such as might, or ought to have been, foreseen in the light of the attending circumstances.

On the doctrine of proximate and remote causes, Mr. Justice Miller, in Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, says: "One of the most valuable of the criteria furnished us by these authorities (i. e., cited by counsel in the case), is to ascertain whether any new cause has

intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

See, also, Hoag v. Railroad Co., 85 Pa. St. 293.
L. Wolf Manuf. Co. v. Wilson, 152 Ill. 14.
St. Louis & S. F. Ry. Co. et al. v. Bennett, 16 C. C. A. 300.
Railway Co. v. Callaghan, 6 C. C. A. 347.
Railway Co. v. Moseley, Id. 641.
Insurance Co. v. Melick, 12 Id. 544.

Again, in Milwaukee etc. Railway Co. v. Kellogg, 94 U. S. 475, above cited, the Court said: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case, the resort of the sufferer must be to the originator of the intermediate cause."

In the case at bar, the fact of the alleged negligent act and the occurrence of the unfortunate event are dissevered by a new and independent agency, namely, by a person stepping upon the hatch covers. The proximate cause of the accident was not the position of the keg, but the subsequent treading of some person on the hatch-covers. The facts in this case are very similar to those

in Fitzgerald v. Timoney, 34 N. Y. Supp. 460. There it appeared, in an action for personal injuries, caused by the fallof plastering from the ceiling of premises leased to plaintiff by defendant, that defendant contracted with a third person to put a new floor in the apartment above that occupied by the plaintiff. An employe of the contractor testified that, while he was engaged in the work, his foot slipped and went through the ceiling, causing a lot of plaster to fall. It was held, that defendant was not liable, though the plaster on the ceiling was insecure, and liable to fall at any time.

"The uncontradicted evidence shows," says the Court, "that the impaired condition of the plastering was not the proximate cause of the injury. It is true that the ceiling might have fallen later through inherent defects, if not repaired, but the Court cannot speculate as to the time when, or that any person would be injured thereby. The undisputed evidence shows that the proximate cause of the injury was the slipping of the contractor's employe, thereby pushing his foot through the ceiling, displacing a large portion of the plaster."

In the case cited the premises were left by plaintiff in an obviously dangerous condition; the probability of the falling of the defective ceiling was certainly greater than the probability of the falling of a keg which was located not directly overhead, but stood at some distance from the hatch. The facts of the case cited are, therefore, more favorable to the establishment of actionable negligence

than those of this case. Herein the *causa causans* was the fact that some one trod on the covers and thereby precipitated the keg.

The learned Judge of the District Court, on page 163, said: "But it is immaterial, in my opinion, whether the person who stepped on the hatch cover was one of the young men who was connected with the vessel, or whether it was one of the stevedores, if the act of placing the keg on the hatch cover to dry was a failure to observe ordinary care, or, in other words, was culpable negligence on the part of those connected with the vessel."

We have, already, in meeting the case of libelant, fully cited the testimony, and referred to cases to prove that the owners of the vessel were not guilty of culpable negligence, or of any negligence. If we agree with the Court below in its above expression, we claim immunity from liability on another ground. The testimony proves that the disturbance of the hatch covers happened neither through design or through negligence, but as the consequence of an inevitable accident. It was a casualty purely accidental. It was done against the will, intent, and desire of the person doing it. That person—under either version of the testimony—was bent upon the performance of a lawful act. No human prudence, forethought, or sagacity can prevent slipping or stumbling. It was an unavoidable accident. "When we speak of an unavoidable accident, in legal phraseology, we do not mean an accident which it was physically impossible in

the nature of things for the defendant to have prevented, all that is meant is, that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise."

Dygert v. Bradley, 8 Wend. (N. Y.) 473.

In the nature of things, the fact of the keg being pitched into the hold by either person was a *casus fortuitus*. But even if, by an utmost stretch of legal construction, it should be held negligence, we submit that the claimants are not liable for its consequences, to whichever version of facts, under the conflicting evidence, credit may be given.

Says Shearman and Redfield on Negligence, section 6: "Negligence is not always necessarily culpable. There are many cases in which it might be desirable that a greater degree of care should be used than the law requires, but it is only the lack of such care or diligence as the law demands, in the particular case, which constitutes culpable negligence, and the law makes no unreasonable demand. It does not require from any man *superhuman wisdom* or foresight. Therefore, no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances," citing

Dygert v. Bradley, 8 Wend. 469.
Harvey v. Dunlop, Hill & D. Supp. 193.

The opinion also announces (p. 165) a rule of law, as follows: "The claimants owed a duty to libelant, as one of the stevedore's gang, to provide reasonable security against danger to life or limb." We do not deny the rule, but we believe that it is applicable only to the case where the claimants have exclusive control, and the acts or omissions of the stevedores are not the direct cause, or do not contribute to the accident.

We believe that this exception is sustained by the cases which are cited in the opinion on page 167, and which we have carefully examined, and believe that none of the cases are based on facts analogous to those of this case, and that none sustains a charge of negligence against the owners of the ship. We take up the cases in the order cited.

In the case of The Bark Kate Camm, 2 Fed. Rep. 241, a structure was erected in the between decks of the ship for the purposes of loading dunnage. It was overloaded, and fell without any apparent cause, other than the excessive weight pressing upon the braces by which it was supported, and there was nothing connected with it to call the libelant's attention to the fact that it was or might be dangerous. So far as the libelant was concerned, it was a trap and hidden danger.

In The Helios, 12 Fed. Rep. 732, the libelant was a stevedore employed in loading the cargo. The chain locker hatch was left open and unprotected. "It was not a hatch for the usual stowage of cargo, such as stevedores must at their peril look out for and are presumed to

know about. It had no reference to the cargo, and the stevedores had no business with it, as the evidence shows. When the first mate told the stevedore the vessel was ready for him to proceed to stow the cargo, that was a virtual warranty against all such traps in the darker parts of the vessel, which could not be, or would not be, perceived in the ordinary course of stowage." It was an evident fact "that this hold was left open and unguarded in a dark place, after the first officer had said the vessel was ready for stowing the cargo."

In The Max Morris, 24 Fed. Rep. 860, it was held that vessels employing stevedores to work upon a ship are bound to provide reasonable safeguards against danger arising from peculiarities in the *construction* of the vessel.

In The Phoenix, 34 Fed. Rep. 760, the libelant was one of a gang of stevedores at work in stowing cotton in the hold of the ship. The sling, containing three bales of cotton, parted, and one of them fell down the hatchway, striking the libelant and inflicting serious injuries upon him. The ship furnished the appliances for loading, among which were the slings. The foreman stevedore testified that he frequently called attention to the unsafe character of the slings. It was held, as a matter of fact, that the sling was an old one, and, it being the duty of the ship to furnish the stevedore with safe appliances, the ship was liable.

In Crawford v. The Wells City, 38 Fed. Rep. 47, the libelant was a grain trimmer, employed by a contractor to

work in trimming the cargo of grain being loaded on board of the ship, and was so engaged when a seaman belonging to the ship placed the hatch cover on. The libelant stood aside while the cover was being put on, but afterward resumed work on the order of the mate of the ship. Two seamen then attempted to spring the hatch cover together, and one cover, which was greasy, slipped and fell upon the libelant and injured him. When hatch covers are placed in position so as to exclude light from those below, the libelant, "in the absence of notice to the contrary, was entitled to assume that the adjustment of the hatch covers had been completed, and especially so when the mate, who directed the placing of the hatch covers, indicated to him it was time for him to resume his work." The Court said, among other things: "The evidence, as I understand it, shows negligence in the performance of the ship's work of putting on the hatch covers. The negligence consisted in attempting to handle the cover by a single man, instead of by two. The cover was greasy and liable to slip, and, in case of any slip, it would be impossible for a single man to hold it, weighing, as it did, some seventy pounds. . . . . The libelant, instead of being warned that the hatch covers were not in place, was, in legal effect, notified by the mate that the covers were in place."

In The Nebo, 40 Fed. Rep. 31, a cross-beam belonging to the ship "Nebo," and supporting a platform made under the orders of the mate, at the request of the stevedore,

to aid in discharging the cargo, broke from being overweighted, seriously injuring one of the men. The captain of the ship knew the beam to be weak or without sufficient support, and claimed to have cautioned the men not to put too much weight on it. Held, the ship was liable; that her officers had no right to thus authorize the use of a defective beam, and should have stopped further loading of cargo on it. The Court said: "If the beam was known to be weak or without sufficient support, neither the mate nor the master had any right to authorize its use for the platform to hold cargo, and, having done so, the ship cannot be exempted from liability simply because they advised the men not to put too much on it, if they did so advise them. The men had no means of knowing or testing its strength, and if the master believed there was too much weight there, it was his business to stop the further loading of it."

In The Terrier, 73 Fed. Rep. 265, a stevedore was working on the hold beneath an open hatch, and while there the servants of the shipowner commenced relaying the floor of between the decks. "In passing the flooring down through the hatchway immediately over the head of the stevedores a plank was allowed to fall, and, striking the libelant, inflicted serious injuries. There was carelessness and negligence both in passing the flooring down through the hatch and allowing the plank to fall. It should have passed through another hatch equally convenient, whereby all danger would have been avoid-

ed. The work was being performed by the crew under the supervision of one of the mates."

In Leathers v. Blessing, 105 U. S. 626, the libelant went on board of the steamboat "Natchez" to see if a consignment of cotton seed which he expected had arrived by that boat. As he was going through a passageway to the officer of the boat, a bale of cotton fell from the upper part of the passageway upon his leg, by which it was injured. The bale of cotton was carelessly and negligently stowed, and was left in such a position that it was liable to fall upon persons going along the passageway to the foot of the stairs of the steamboat, and its position was known to the master of the steamboat. "The libelant not only went on board of the boat for a purpose proper in itself, and so far as he was concerned, but he went substantially on the invitation of those in control of the vessel." Under such circumstances, the relation of the owner of the vessel to the libelant was such as to create a duty on them to see that the libelant was not injured by the negligence of the master.

In The Frank and Willie, 45 Fed. Rep. 494, the mate of a vessel, working with the seamen in discharging a cargo of lumber, continued to unload the cargo in a dangerous manner, after his attention had been called to the danger and complaints had been made, and persistently and obstinately refused to take the usual precautions to prevent the lumber from falling. The cargo subsequently fell and injured a sailor. The vessel was held liable.

In Dickson v. Pluns, 98 Cal. 384, a chisel which fell on the plaintiff, was in the exclusive control of defendants' servant. It was in his hands when it fell. The tool was being managed by the defendant's servant.

McCauley v. Norcross, 155 Mass. 584, was an action of tort brought under a statute of Massachusetts, entitled, "An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employes in their service." By the second section of this act, the employer was made liable, "By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence."

Act of 1887, c. 270, sec. 2.

On the trial in the court below, the defendant requested the judge to rule that, upon all the evidence, the plaintiff could not recover. The judge refused so to rule, and the jury having found a verdict for the plaintiff, the defendants alleged exceptions. This was the only exception taken in the case. The Court pointed out several particulars in which the jury might have found that the superintendent was guilty of negligence in exercising superintendence in respect to the beam which fell upon and injured the plaintiff, and said:

"The question is whether the moving of the beam was so likely to occur that it ought to have been provided against by the superintendent."

The jury must have found that the superintendent was,

in some respect, negligent, otherwise they would not have rendered a verdict for the plaintiff; but in what particular they found that he was negligent does not appear. While the Court said, "The fact that the superintendent himself happened to be the person who pushed the beam with his foot is of no importance because that "was not an act of superintendence," still, the jury might not have drawn so nice a legal distinction and might have found—and we think it not a violent presumption that it did so find—that this was an act of negligence, on his part, as superintendent, and based their verdict upon it. But, however this may be, the facts and conditions of this case are very different from the one at bar. In the case cited, the defendants had, by their servant, the superintendent, the exclusive management and control of the beams that fell upon and injured the plaintiff.

In each of these cases the duty and responsibiity for violation thereof rested exclusively with the defendant, and furnish no rule applicable to the facts of the case at bar.

The opinion of the Court announces (p. 168) a further principle, as follows: "It is undoubtedly true that in actions for injury resulting from the negligent acts of others, the burden is on the plaintiff to make out a *prima facie* case of negligence, but it is also true that there is a class of cases where the fact of injury itself, connected with other facts and circumstances, establishes that there was negligence to justify a judgment for damages."

But this, we contend, is an exception to a stringent rule of law, and demands exceptional facts, and we submit, that the facts of this case keep it within the rule, and noway beyond the operation of it. So unlike are they to those of the cases cited in the opinion on page 169 *et seq.*, to which we now specifically refer this Court.

The case first cited is Scott v. London Dock Co., 3 Hurl. & Colt, 596, 601. In this case is announced a rule which we claim sustains the position of these appellants. The defendant was possessed of a warehouse and of machines for lowering goods therefrom. Certain bags of sugar were being lowered to the ground, along which the plaintiff was lawfuly passing. This work was done so negligently by the servants of the defendant that the bags fell upon and injured the plaintiff. The Court of Exchequer held that there was no sufficient evidence of negligence on the part of the defendant to justify its leaving the case to the jury, and directed a verdict for the defendant. Thereafter, a rule nisi for a new trial was obtained on the ground that there was evidence for the jury of negligence of defendant's servants. Subsequently, this rule was made absolute, in order that the case might be taken to a court of error. In the Exchequer Chamber the judgment of the Court of Exchequer, making the rule absolute, was affirmed—Erle, C. J., and Mellor, J., dissenting—and a new trial ordered. It was in this case that Erle, C. J., said: "The majority of the court have come to the following conclusions: There must be reasonable evi-

dence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In Byrne v. Boadle, 2 H. & C. 721, the plaintiff was walking in a public street past the defendant's shop, when a barrel of flour fell from a window of the shop and injured him. It was held sufficient prima facie evidence of negligence for the jury to cast on the defendant the onus of proof that the accident was not caused by his negligence. In this case the barrel was in the exclusive custody of the defendant, who occupied the premises, and as the barrel could not roll out of the warehouse without some negligence, the Court, in the absence of all proof as to what caused it to roll out, applied the doctrine of *res ipsa loquitur*.

In White v. France, L. R. 2 C. P. Div. 308, cited in the opinion on page 170, the plaintiff was on defendant's premises in relation to a matter of business that concerned the defendant, and having been referred to defendant's foreman, while approaching him, a bale of goods which had been negligently left by defendant's servants nicely balanced at the edge of a warehouse trapdoor, from where such bales were lowered, suddenly fell upon and injured him. The Court held that the bale which caused

the injury was placed in such a position as to be dangerous, and yet not to give any warning of danger to anyone passing by the spot where it fell, so it was a trap or concealed source of mischief.

In Kearney v. London etc. Ry. Co., L. R. 5 Q. B. 411, the plaintiff was passing along a highway under a railway bridge of the defendants. A brick fell from the pilaster of a wall on which a girder of the bridge rested, and injured the plaintiff. A train had passed just previously. Held, by Cockburn, C. J., and Lushington, J.—Harmon, J., dissenting—that so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence of the defendants.

On appeal to the Exchequer Chamber, L. R. 6 Q. B. 760, the judgment in favor of the plaintiff was affirmed. Kelly, C. B., said: "It appears, without contradiction, that the brick fell out of the pier of the bridge without any assignable cause, except the slight vibration caused by the passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose, for otherwise so slight a vibration could not have struck it out of its place. . . . . If there were necessity for further evidence, the case is made still stronger by the evidence of the plaintiff, which is uncontradicted on the part of the defendants, that after the accident, on fitting the brick to its place, several other bricks were found to have fallen out."

In Howser v. Cumberland & B. R. Co., 80 Md. 146, 30 Atl. 906, the plaintiff was walking along a pathway out-

side of the railroad company's right of way. Some ties which were loaded on a "gondolier car" slipped or fell from the car on which they were loaded and injured the plaintiff. It was held that this fact was, under the doctrine of *res ipsa loquitur*, *prima facie* evidence of negligence on the part of the railway company—JJ. McSherry and Fowler dissenting.

Pastine v. Adams, 49 Cal. 87, announces a principle applicable only to a case where the owners of a ship, being in control, should be held liable to a condition of things for which it was wholly responsible. It does not cover a case where the owners were simply the owners, and did not create and maintain the condition of things by reason of which the accident occurred.

: Finally, if the testimony of two eyewitnesses who were actually in the most favorable position to know be accepted, it was one of the stevedore's men who stepped upon the hatch covers and caused the keg to fall. Hence, if such act was negligence, it was not negligence on the part of the ship, and the ship is not responsible for its consequences.

If, on the other hand, the theory attempted to be proved by libelant be credited, although, as we think we have shown, it has no intrinsic merit, it was the second mate or one of the ship's boys who disturbed the equilibrium of the hatch covers and thereby pitched the keg into the hold, still, we claim that, even under this assumption of the facts, libelant has failed to establish any

liability on the part of the claimants arising from alleged want of care.

If the libelant has any cause of action for damages, it is against the stevedore who employed him, and not against the claimants, who employed the stevedore under a contract.

It is to be continuously borne in mind that the determination hereof depends upon a question of the true state of the facts concurrent on the ship. There are versions of two sets of witnesses. The Court will notice that the witnesses upon whom the libelant must chiefly rely were Davidson, Fitzgerald, Gray, King, Nelson, P. O'Donnell, and Ryan. Of these there was no one who did not state either something palpably inconsistent with something that some other of his witnesses had said, or else something so improbable or impossible, and uncorroborated by any other, as to leave an impression of the untrustworthiness of the witness.

The witnesses upon whom claimants rely are the second and third mates. We respectively submit that there can hardly be any doubt, under these circumstances, that the testimony of the two claimants' witnesses, who corroborate each other in every particular, is to be preferred to that of the witnesses of libelant, who, in material matters, corroborate each other in scarcely any particular. This seems especially significant from the fact that we fail to discover that either of the mates told anything evasive, prevaricatory, or suggestive of anything but what was probable, reasonable and true.

Notwithstanding the necessity of a careful and critical examination of the testimony and the authorities, in order to illustrate the contention of the claimants, still, we must apologize for the length of the foregoing discussion; yet, if this Court shall, in its investigation of the cause, derive from it the slightest aid, then its purposes will have been accomplished and in this hope it is respectfully submitted.

ANDROS & FRANK,:
Advocates for Appellants.